

Is Notice Required in a Title IX Athletics Action Not Involving Sexual Harassment?

Diane Heckman

Follow this and additional works at: <http://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment and Sports Law Commons](#)

Repository Citation

Diane Heckman, *Is Notice Required in a Title IX Athletics Action Not Involving Sexual Harassment?*, 14 Marq. Sports L. Rev. 175 (2003)
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol14/iss1/29>

This Symposium is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

IS NOTICE REQUIRED IN A TITLE IX ATHLETICS ACTION NOT INVOLVING SEXUAL HARASSMENT?

DIANE HECKMAN*

- I. Introduction
- II. Title IX and Sexual Harassment Generally
 - A. What Standard Should be Applied?
 - B. Who Should be Informed of the Sexual Harassment?
 - C. Leading Title VII Sexual Harassment Cases
- III. Title IX and the Notice Requirement in Sexual Harassment Cases
 - A. Pre-*Gebser* Decisions Involving Teacher-Student Harassment
 - 1. Elementary and Secondary Students
 - 2. Post-Secondary Students
 - B. Supreme Court Decision in *Gebser v. Lago Vista Independent School District*: Silence is Golden
 - C. Supreme Court Decision in *Davis v. Monroe County Board of Education*
 - D. Post-*Gebser* Decisions
 - E. Claims Involving Coaches and Student-Athletes
 - F. Individual Educational Employees and Whether They Are Appropriate Individuals to Place on Notice

*. Attorney in New York; Adjunct Assistant Professor, Hofstra University, Hempstead, New York. She is the author of the following Title IX articles (presented chronologically): *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1 (1992); *The Explosion of Title IX Legal Action in Intercollegiate Athletics During 1992-93: Defining the "Equal Opportunity" Standard*, 1994 DETROIT C. L. REV. 953 (1994); *On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545 (1997); *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391 (1997); *Lowrey v. Texas A&M University Systems: Title IX vis-à-vis Title VII Sex Discrimination and Retaliation in Educational Employment*, 124 EDUC. L. REP. 753 (1998); *Title IX Tapestry: Threshold & Procedural Issues*, 153 EDUC. L. REP. 849 (2001); *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551 (2003).

IV. Title IX Sex Discrimination in Educational Athletic Programs and Activities

- A. The Nature of the Administration of Athletics Departments
- B. The Existence of Title IX Regulations Governing Athletic Programs and the Absence of Express Notice Requirements Within Those Regulations
- C. Other Disclosure Provisions
 - 1. Equity in Athletics Disclosure Act
 - 2. NCAA Certification Requirements
- D. Administrative Redress for Athletic Complaints
- E. The *Gebser* Directive
- F. Caselaw
 - 1. *Grandson v. University of Minnesota*
 - 2. *Mercer v. Duke University*
 - 3. Addendum

V. Conclusion

I. INTRODUCTION

The thirtieth anniversary of the passage of Title IX of the Education Amendments of 1972 (Title IX)¹ was marked on June 23, 2002. Title IX is a federal gender discrimination statute applicable to educational programs and activities that are recipients of federal funds. The Title IX statute directs, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"² Title IX did not expressly provide for a private right of action, which has been judicially implied.³ The traditional elements needed to be established in a Title IX action were: (1) an educational program or activity was involved,⁴ (2) that received federal funds,⁵ and (3) discrimination

1. 20 U.S.C. §§ 1681-1688 (2000). See Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551 (2003) [hereinafter Heckman, *The Glass Sneaker*].

2. 20 U.S.C. § 1681(a).

3. See, e.g., *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979); *Doe v. Univ. of Ill.*, 138 F.3d 653, 665 (7th Cir. 1998), cert. granted, judgment vacated, sub nom.; *Bd. of Trs. v. Doe*, 526 U.S. 1142 (1999), on remand, 200 F.3d 499 (7th Cir. 1999).

4. 20 U.S.C. § 1681. See Heckman, *The Glass Sneaker*, supra note 1, at 553 n.10.

5. 20 U.S.C. § 1681. See Heckman, *The Glass Sneaker*, supra note 1, at 553 n.11.

occurred based on sex. In cases involving sexual harassment,⁶ a fourth element was recently imposed: a notice requirement. This notice requirement has been applied to cases involving sexual harassment by students against educational institutions for the alleged actions of teachers or other educational employees toward students or by fellow students (peer sexual harassment). Title IX is directed toward seeking redress against the recipient of federal funds, the educational institution, rather than remedying the officious actions of the individuals involved, whether it is the school employee⁷ or fellow student. Since the administration of the athletic departments at the elementary, secondary, or post-secondary levels is done by employees of the educational institutions, the article concentrates on the caselaw involving employees of educational institutions. This article traverses the litigation landscape involving Title IX and examines whether this law imposes a notice requirement in cases pertaining to amateur athletics not involving sexual harassment.

The Title IX paradigm includes not only the statute, but implementing regulations,⁸ a number of administrative policy documents,⁹ as well as the caselaw. The statutory language does not expressly mention either amateur athletics or sexual harassment.¹⁰ While there is also an absence of any regulations governing sexual harassment,¹¹ there are regulations specifically directed toward physical education¹² and educational programs and activities involving interscholastic, intercollegiate, club, and intramural athletics.¹³ Does the presence of the regulations and administration of athletic programs insulate potential plaintiffs from having to affirmatively first place the educational institution on notice that a Title IX violation has occurred?¹⁴

6. 20 U.S.C. § 1681.

7. See, e.g., *Jennings v. Univ. of N.C.*, 240 F. Supp. 2d 492, 498-99 (M.D.N.C. 2002) (exploring allegations by former female soccer players concerning their male head coach).

8. 34 C.F.R. pt. 106 (2002).

9. See e.g., Title IX of the Education Amendments of 1972: A Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,413-23 (Dec. 11, 1979) [hereinafter Policy Interpretation]; Dep't of Educ., Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996) [hereinafter Policy Interpretation]. The Department of Health, Education and Welfare originally had administrative oversight responsibility; with its demise, the responsibility for assessing educational institutions is within the Department of Education.

10. 20 U.S.C. §§ 1681-1688.

11. 34 C.F.R. pt. 106 (2002).

12. 34 C.F.R. § 106.34(a).

13. 34 C.F.R. §§ 106.37(c) and 106.41(a).

14. Parenthetically, during June 2002, the Secretary of Education authorized a commission to look into the state of affairs at the nation's intercollegiate athletic programs that were recipients of

Part II reviews some preliminary matters concerning Title IX's application when sexual harassment is involved. Part III focuses on relationships between teachers and students, and between coaches and student-athletes, including a landmark Supreme Court decision and its aftermath. Part IV explores the administration of athletic departments, governing regulations, and litigation involving amateur athletics.

II. TITLE IX AND SEXUAL HARASSMENT GENERALLY

Although the statute is silent on explicitly covering sexual harassment within the definition of "sex discrimination," it is clear that Title IX does cover sexual harassment conduct.¹⁵ As indicated, in addition to the statute, there are implementing regulations, although none of the regulations voice instruction on the specific actions of sexual harassment.

Nationally, sexual harassment in employment has been prohibited through Title VII of the Civil Rights Act of 1964.¹⁶ Sexual harassment is broken down into two general types: quid pro quo harassment and hostile environment harassment. Students' claims for quid pro quo harassment (such as a professor demanding sex from a student in exchange for a high grade) in an educational environment are infrequently advanced.¹⁷ In general, Title IX cases alleging

federal funds. The commission issued a report on January 29, 2003. See *Secretary's Commission on Opportunity in Athletics*, at <http://www.ed.gov/pubs/inits/commissionsboards/athletics/index/html> (last visited Oct. 2, 2003). This was followed by the issuance of a minority report. Donna de Varona & Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics*, Feb. 2003 [hereinafter *Minority Report*]. The complete text of *Minority Report* is included within this publication. The Secretary pledged that he would not entertain any of the recommendations within the Commission's report unless they had received unanimous endorsement by all fifteen members. See Heckman, *The Glass Sneaker*, *supra* note 1, at 612-13. It is not expected that any action the Secretary may take would impact on this issue of prior notice as a condition precedent to a federal lawsuit. The Commission was charged with looking into extracurricular athletics only on the intercollegiate level, and not both the intercollegiate and interscholastic area.

15. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 (1992).

16. 42 U.S.C. § 2000e-2(a)(1) (1994). See Diane Heckman, *On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545, 618-50 (1997) [hereinafter Heckman, *Sex Discrimination in the Gym*], for a foundation on the area of sexual harassment. See also Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the "Equal Opportunity" Standard*, 1994 DETROIT C.L. REV. 953, 1018-21 (1994) [hereinafter Heckman, *Defining the "Equal Opportunity" Standard*] (examining early Title IX sexual harassment cases).

17. "Quid pro quo harassment arises when the receipt of benefits or the maintenance of the status quo is conditioned on acquiescence to sexual advances." *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467 (8th Cir. 1996) (citing *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995)). See, e.g., *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911 (S.D. Ohio 1998), discussed *infra*; *Slater v. Marshall*, 906 F. Supp. 256 (E.D. Pa. 1995), discussed *infra*.

sexual harassment were sparse¹⁸ until the 1992 Supreme Court decision in *Franklin v. Gwinnett County Public Schools*,¹⁹ which upheld the right to monetary damages when intentional discrimination is proven, in a case where a female student alleged sexual harassment against the school board for the action of a male teacher, who was incidentally a coach of one of the boys' teams. This decision, coming twenty years after the initial passage of Title IX, which allowed for monetary damages rather than mere injunctive relief, would be groundbreaking. Subsequently, allegations of educational institutions permitting, fostering, or sanctioning a hostile environment for students continues to be increasingly litigated, especially in light of the *Franklin* decision. Since civil litigants are seeking monetary damages, specifically against educational institutions based on allegations of Title IX violations concerning sexual harassment, the critical issue is what standard should be applied. This issue was not addressed in *Franklin*. It would not be until 1998 that the Supreme Court, in *Gebser v. Lago Vista Independent School District*,²⁰ answered this inquiry as it involves teachers and students. Additionally, in 1998 the Supreme Court agreed to hear the appeal involving what Title IX standard, if any, should be applied to determine the culpability of educational institutions for peer (student-on-student) sexual harassment, which resulted in its 1999 decision in *Davis v. Monroe County Board of Education*.²¹ The fallout from these two decisions remains to be seen.

A. What Standard Should Be Applied?

Title IX covers an assortment of harassment, from creating a hostile educational environment verbally to sexual abuse, including statutory rape. In general, prior to the *Franklin* decision, individuals utilized the criminal justice system for the more egregious situations. Title IX presented a potential civil avenue to pursue remedies.²² The discourse concerning the parameters of Title IX's protection and remedies has essentially only begun, despite the intervening thirty years since the statute's enactment.

During the 1990s, the judiciary applied a number of different approaches

18. See Heckman, *Defining the "Equal Opportunity" Standard*, *supra* note 16.

19. 503 U.S. 60 (1992). For a discussion of the *Franklin* case, see Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 24 n.102 (1992) [hereinafter Heckman, *Women & Athletics*]. See Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001) (concluding front pay was not an element of compensatory damages in a Title VII employment-based discriminatory action).

20. 524 U.S. 274 (1998).

21. 526 U.S. 629 (1999).

22. See Diane Heckman, *Title IX Tapestry: Threshold & Procedural Issues*, 153 EDUC. L. REP. 849, 867 (2001) [hereinafter Heckman, *Title IX Tapestry*].

to determine whether an educational institution was liable for the intentional discriminatory acts of its employees or students pursuant to Title IX.

Some of the approaches are so close as to be overlapping. The first standard required knowledge or direct involvement by the school district or educational institution. The second standard used the intentional discrimination standard from Title VI of the Civil Rights Act of 1964 (Title VI).²³ The factors required to satisfy this standard are: (1) a showing of direct involvement of the school district in the discrimination; or (2) a showing of (a) actual or constructive knowledge on the part of the district of the sexual harassment of a student, and (b) that the school failed to take immediate appropriate action reasonably calculated to prevent or stop the harassment.

A third standard utilized the agency principles contained in the RESTATEMENT (SECOND) OF AGENCY, Section 219(2)(b), essentially a negligence or reckless standard. The six factors needed to satisfy this "agency standard" were: (1) the school district is subject to Title IX; (2) plaintiff was sexually harassed or abused; (3) by an employee of the educational institution; (4) the educational institution had notice, either actual or constructive, of the sexual harassment or abuse; (5) the educational institution failed to take prompt, effective, remedial measures; and (6) the conduct of the educational institution was negligent. This is basically a modified version of the Title VI standard, with the addition of the last element.

A fourth standard imposed the Title VII's standard of employer liability in hostile environment sexual harassment cases, in that the employer knew, or should have known, of the offending circumstances. The elements required to satisfy this standard are: (1) that the individual is a member of a protected group; (2) that this individual was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of the individual's education and create an abusive educational environment; and (5) that some basis for institutional liability has been established.

The fifth standard required strict liability. In addition, a final standard was reliance on negligence liability. The United States Department of Education's Office for Civil Rights (OCR) oversees administrative compliance with Title IX. On March 13, 1997, the OCR issued its Final Policy Guidance using a negligence standard for Title IX hostile environment claims.²⁴ The Seventh

23. 42 U.S.C. § 2000a (1994) prohibits discrimination based on race in certain public places, such as public educational institutions that are recipients of federal funds.

24. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039-41 (Mar. 13, 1997). Revisions were subsequently made to this policy statement in light of the *Gebser* and *Davis* decisions. See Verna Williams & Deborah L.

Circuit in *Smith v. Metropolitan School District Perry Township* pronounced, "While this recently elaborated Policy Guidance may represent the longstanding view of the OCR, the application of agency principles has no foundation in the language of Title IX."²⁵ The Supreme Court would ultimately put the diverging opinions to rest with its two pivotal decisions.

B. Who Should Be Informed of the Sexual Harassment?

The aspect of actual knowledge or constructive knowledge is another issue within the paradigm: to whom must the knowledge be transferred or made available in order to have the educational institution be held ultimately responsible for the sexual harassment?²⁶ Should a potential plaintiff have to establish that notice was communicated: (a) solely to the members of the school board when dealing with an elementary or secondary school; or (b) should knowledge to the individual school's administrators (for example the principal or vice-principal) suffice; or (c) should it suffice for a student, parent, or guardian to inform a student's teacher, coach, or guidance counselor? Should the age of the student be taken into effect? If it is a minor, then should notice to a teacher suffice? If an accident occurred in the

Brake, *Sexual Harassment: Let the Punishment Fit the Crime*, WEEA DIGEST, Oct. 1998, at 3-4, 6 (noting that "Title IX does not ban flirtation." *Id.* at 4. Moreover, "Title IX does not suppress academic discourse, even if it is offensive." *Id.*). For cases dealing with claims of offensive classroom language, see, e.g., *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001); *Gallant v. Bd. of Trs. of Cal. State Univ.*, 997 F. Supp. 1231 (N.D. Cal. 1998).

25. 128 F.3d 1014, 1033 (7th Cir. 1997), *cert. denied*, 524 U.S. 951 (1998).

26. See, e.g., *Gebser*, 524 U.S. at 290; *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 678 (1999) (J. Kennedy dissenting). For cases issued post-*Gebser*: see *Baynard v. Alexandria City Sch. Dist.*, 535 U.S. 594 (2002) (teacher-student sexual harassment: notice to principal was insufficient); *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001), *cert. denied, sub nom. Baynard v. Alexandria City Sch. Bd.*, 535 U.S. 954 (2002); *Warrant ex rel. Good v. Reading Sch. Dist.*, 278 F.3d 163 (3d Cir. 2002) (teacher-student sexual harassment: notice to principal was sufficient; however, notice to a guidance counselor was not); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999) (peer sexual harassment: notice to principal was sufficient); *Bostic v. Smyrna Sch. Dist.*, No. 01-0261KAJ, 2003 WL 723262 (D. Del. Feb. 24, 2003) (coach-student-athlete sexual harassment: notice to principal was sufficient); *Crandell v. N.Y. Coll. of Osteopathic Med.*, 87 F. Supp. 2d 304, 320-21 (S.D.N.Y. 2000) (teachers-medical student sexual harassment retaliation: notice to associate dean of Clinical Affairs, who had authority to take corrective measures, was sufficient); *Morlock v. W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892 (D. Minn. 1999) (teacher-student sexual harassment). For cases issued pre-*Gebser*: see *Smith*, 128 F.3d 1014; *Kracunas v. Iona Coll.*, 119 F.3d 80 (2d Cir. 1997); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997) (teacher-student harassment, concerning school official); *Leija v. Canutillo Indep. Sch. Dist.*, 101 F.3d 393 (5th Cir. 1996) (teacher-student harassment: notice to a homeroom teacher was not sufficient); *Doe v. Beaumont Indep. Sch. Dist.*, 8 F. Supp. 2d 596 (E.D. Tex. 1998) (teacher-student harassment, granting summary judgment even though grade school student had complained to another teacher); *Ericson v. Syracuse Univ.*, 35 F. Supp. 2d 326, 328 (S.D.N.Y. 1998) (coach-student-athlete harassment); *Miller v. Kentosch*, No. 97-6541, 1998 WL 35520 (E.D. Pa. June 29, 1998) (teacher-student harassment).

teacher's classroom, every teacher would be obligated to inform his or her superiors. Should a more burdensome requirement be imposed on students when the act involves sexual harassment? At the elementary and secondary level, the students do not have regular unfettered contact with the school principal or vice principal as compared to a teacher or coach. Moreover, whether the students know or encounter school board members or the superintendent of the public school district would be a rare occurrence.

In general, a classroom teacher would be obligated under state law to report any suspected child abuse of their students.²⁷ If teachers are enveloped with this serious obligation and responsibility, which is consistent with the prevailing status of the school acting *in loco parentis*, then should such notice to a classroom teacher of sexual harassment activity be sufficient to meet the requirement for the element of actual notice (with the explicit and implicit understanding that it is the teachers' obligation to pass on the information to their superiors-employers)? Likewise, if a school administrator is informed, then wouldn't that (automatically) be that individual's responsibility to inform the school board? On the collegiate level, likewise, to whom is notice required: a professor, coach, athletic director, the school president or provost, or board members? It remains to be seen which school employees will be deemed the "appropriate" individuals.²⁸

C. Leading Title VII Sexual Harassment Cases

The 1997-98 Supreme Court term remarkably yielded three decisions in the area of Title VII employment sexual harassment. On March 4, 1998, the

27. See, e.g., N.Y. SOC. SERV. LAW § 413 (McKinney 1995) (requiring teachers to report incidents of suspected child abuse); TEX. FAM. CODE ANN. § 261.101(a) (West 1996) (same). See *Doe v. Rains County Indep. Sch. Dist.*, 865 F. Supp. 375 (E.D. Tex. 1994) (female student alleged a male high school teacher and coach had sexually abused her violating her Fourteenth Amendment substantive due process rights concerning her liberty interest; and secondarily, that the principal failed to report the sexual abuse as required by Texas state law), *appeal filed*, No. 94-41318, 1996 WL 65684 (5th Cir. Mar. 1, 1996) (finding that principal was not required to report suspected child abuse between a female student and male coach, where the principal saw the two individuals together and where he asked another coach if anything was going on between the two and received an inconclusive response by the other coach). See also *Doe v. Gooden*, 214 F.3d 952 (8th Cir. 2000) (concluding that school district officials' failure to report alleged sexual abuse by a teacher, in violation of an Arkansas state law, did not rise to a section 1983 constitutional violation, 42 U.S.C. § 1983 (1994)). But see *P.H. v. Sch. Dist. of Kansas City, Mo.*, 265 F.3d 653 (8th Cir. 2001) (determining that a Kansas public school district could be liable under 42 U.S.C. § 1983 for failure to receive and investigate claims of sexual abuse and failing to train its employees to prevent or terminate sexual abuse).

28. See *Gebser*, 524 U.S. at 290 (imposing the requirement that an appropriate person must be placed on notice who has authority to make changes). See *infra* Part III, section B for discussion of the *Gebser* opinion and Part III, section D for cases issued post-*Gebser*.

Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.*²⁹ held that same-sex harassment claims are actionable pursuant to Title VII. In addition to heterosexual relationships, Title IX also protects against same-sex³⁰ and transsexual³¹ educational harassment claims. On June 26, 1998, the Supreme Court in *Burlington Industries, Inc. v. Ellerth*,³² found that an employee could still prevail in a Title VII action against an employer in a sexual harassment lawsuit where she refused the unwelcome sexual advances of a superior even though the individual suffered no tangible negative job condition as a result.³³ The Court further instructed that the employer could limit or escape liability if it had "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"³⁴ Moreover, the Court indicated that the employee

29. 523 U.S. 75 (1998), *on remand*, 140 F.3d 595 (5th Cir. 1998).

30. See, e.g., *Warren ex rel. Good v. Reading Sch. Dist.*, 278 F.3d 163 (3rd Cir. 2002) (involving a male fourth grade student alleging sexual harassment involving his male teacher, who was subsequently arrested); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52 (1st Cir. 2002) (rejecting a claim of sexual harassment brought by a female student against a female matron charged with monitoring the girls' bathroom); *P.H. v. Sch. Dist. of Kansas City*, 265 F.3d 653 (8th Cir. 2001) (finding no Title IX liability as the school did not learn of a relationship, which purportedly lasted for two years, between a male teacher with the male student, until after it ended); *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211 (5th Cir. 1998) (involving allegations of sexual harassment of male students by a male teacher), *on remand* (granting the school district summary judgment on the Title IX claim), *aff'd*, 220 F.3d 380 (5th Cir. 2000) (principal's response to an allegation of sexual molestation did not amount to deliberate indifference; thus, the male student did not meet the high standard imposed by the Supreme Court based on the intervening decision in *Gebser*, discussed *infra*, *cert. denied*, 531 U.S. 1073 (2001); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996) (female teacher—female student alleged harassment); *Does v. Covington County Sch. Bd.*, 969 F. Supp. 1264 (M.D. Ala. 1997) (male teacher—male student alleged harassment); *Donovan v. Mount Ida Coll.*, No. 96CV10289RGS, 1997 WL 259522 (D. Mass. Jan. 3, 1997) (concerning allegations of Title IX sexual harassment by female lesbian student against her college for alleged acts of female professor in making unwanted sexual advances.) The court found that Title IX was not restricted to heterosexual conduct. *Id.* at *2.

31. See, e.g., *Miles v. N.Y. Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997), *aff'd (without mem.)*, 182 F.3d 900 (2d Cir. 1999) (finding Title IX protection covered a male-to-female transsexual in the process of becoming a female, who was at all times treated as a female, and had alleged sexual harassment by a male professor).

32. 524 U.S. 742 (1998). See also Lisa I. Fried, *Sexual Harassment: Revisiting the High Court's Rulings a Year Later*, N.Y.L.J., June 3, 1999, at 5 (summarizing that "employers must take steps to prevent sexual harassment and establish procedures for complaints, and employees with such claims must avail themselves of these procedures before filing suit"). The article also summarized the results of sixteen employment sexual harassment decisions issued by the Second Circuit Court since *Ellerth* and *Faragher*.

33. *Ellerth*, 524 U.S. at 742. "We must decide, then, whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threat." *Id.* at 754. In *Russell v. Bd. of Trs.*, 243 F.3d 336 (7th Cir. 2001), the Seventh Circuit Court held boorish comments can not establish a hostile work environment pursuant to Title VII.

34. *Ellerth*, 524 U.S. at 765.

was obligated to "take advantage of any preventive or corrective opportunities provided by the employer" ³⁵

On the same day, June 26, 1998, the Supreme Court issued its ruling in *Faragher v. City of Boca Raton*,³⁶ concerning a female ocean lifeguard working for the City of Boca Raton in Florida, who claimed inappropriate bodily touching of her thigh and backside by two male lifeguard superiors.³⁷ The Court stated, "So, in *Harris*, we explained that in order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."³⁸ The Court found that an employer would be liable for workplace hostile environment sexual harassment that results in a "tangible employment action" being taken against an employee.³⁹ The Court also elaborated upon when an employer may be held liable for non-tangible actions and identified two affirmative defenses that could be interposed by the employer: where the employer "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and where the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm."⁴⁰

The Court would not impose these requirements when it came to Title IX sexual harassment claims involving students subject to sexual harassment.⁴¹ However, reliance on Title VII may still occur in Title IX employment harassment cases. This is again fostered due to the void in the Title IX statute and regulations pertaining to sexual harassment.

35. *Id.* at 745.

36. *Id.* at 775.

37. Gaylord Shaw, *Employers Beware: Rulings Make it Easier to Sue for Sex Harassment*, NEWSDAY, June 27, 1998, at A3. "Even though the city had a formal anti-harassment policy, the Court found the city liable, noting that Boca Raton had failed to disseminate the policy to the beach employees. The Court also faulted Boca Raton for making no effort to keep track of the supervisors' conduct and for not making clear that employees could bypass the harassing supervisors if they wanted to file complaints." Steven Greenhouse, *Companies Set to Get Tougher on Harassment: Policies Under Review After Court Decision*, N.Y. TIMES, June 28, 1998, at 14.

38. 524 U.S. at 787 (citing *Harris*, 510 U.S. at 21-22).

39. *Id.* at 807-08.

40. *Id.* at 807.

41. See e.g., *Davis*, 526 U.S. 629; *Gebser*, 524 U.S. 274.

III. TITLE IX AND THE NOTICE REQUIREMENT IN SEXUAL HARASSMENT CASES

A. Pre-Gebser Decisions Involving Teacher-Student Harassment

There has been an enormous proliferation of Title IX sexual harassment cases by students based on actions of their teachers.⁴² During 1996-1997, the Second,⁴³ Fifth,⁴⁴ Sixth,⁴⁵ and Seventh⁴⁶ Circuits all issued decisions in this

42. See e.g., *McCaffrey v. Oona R.-S.*, 526 U.S. 1154 (1999) (female sixth-grade student alleged sexual harassment by student-teacher and fellow students); *Lankford v. Doe*, 513 U.S. 815 (1994) (Section 1983 action involving a fifteen-year-old female student alleging sexual abuse by male biology teacher, who was incidentally a coach); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992), *on remand*, 969 F.2d 1022 (11th Cir. 1992) (female student alleged sexual harassment by male teacher, who was incidentally a coach); *Lipsett v. Univ. of P.R.*, 864 F.2d 881 (1st Cir. 1988); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994), *cert. denied, sub nom. Caplinger v. Doe*, 506 U.S. 1087 (1993); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996) (female high school students alleged sexual harassment against male science teacher-coach of women's soccer team); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996) (allegations of a homosexual relationship between teacher and student would be actionable under Title IX); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996) (ruling that the college's sexual harassment policy was unconstitutionally vague. Herein, a female student in the male professor's remedial English class charged him with sexual harassment due to the content of his remarks in class, including a class discussing pornography), *cert. denied*, 520 U.S. 1140 (1997); *Stilley v. Univ. of Pittsburgh*, 968 F. Supp. 252 (W.D. Pa. 1996) (applying agency principles to a female student's claim of sexual harassment by a male professor (advisor and supervisor). There existed a genuine issue of material fact to preclude the granting of summary judgment on behalf of the University); *Nelson v. Almont Cmty. Sch.*, 931 F. Supp. 1345, 1355 (E.D. Mich. 1996) (applying the Title VI intentional discrimination standard to a male high school student, who alleged sexual harassment by a female English teacher); *Bolon v. Rolla Pub. Sch.*, 917 F. Supp. 1423 (E.D. Mo. 1996) (raising allegations by sixteen-year-old female student against male teacher, who was also incidentally a football coach); *Oona R.-S. v. Santa Rosa City Sch.*, 890 F. Supp. 1452 (N.D. Cal. 1995), *aff'd*, 122 F.3d 1207 (9th Cir. 1997), *opinion withdrawn & superseded on denial of reh'g*, 143 F.3d 473, *cert. denied, sub nom. McCaffrey v. Oona R.S.*, 526 U.S. 1154 (1999); *Slater v. Marshall*, 906 F. Supp. 256 (E.D. Pa. 1995) (female college student alleged quid pro quo harassment by male professor at Montgomery County Community College); *Kadiki v. Va. Commonwealth Univ.*, 892 F. Supp. 746 (E.D. Va. 1995) (female college student alleged sexual harassment by male biology professor); *Does v. Covington County Sch. Bd.*, 884 F. Supp. 462 (M.D. Ala. 1995) (male students alleged sexual harassment by male teacher); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288 (N.D. Cal. 1993) (portraying allegations of sexual molestation of female student by male band teacher); *Moire v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986); *Alexander v. Yale Univ.*, 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980) (concerning female manager of field hockey team).

43. *Kracunas v. Iona Coll.*, 119 F.3d 80 (2d Cir. 1997). See *Freydel v. N.Y. Hosp.*, 242 F.3d 365 (2d Cir. 2000) The Second Circuit in analyzing a disability discrimination case, premised on the lack of a Russian sign language interpreter, brought under the Rehabilitation Act of 1963, 29 U.S.C. § 794 (1994), cited *Gebser*, discussed *infra*, and commented, "The premise, in other words, is an official decision by the recipient not to remedy the violation." *Id.* at *4.

44. See, e.g., *Leija v. Canutillo Indep. Sch. Dist.*, 887 F. Supp. 947 (W.D. Tex. 1995), *rev'd*, 101

area. The Supreme Court would ultimately review this area in 1998. A number of these cases showcase that merely informing other teachers about the actions of a particular teacher will not satisfy sufficient notice to trigger liability upon the school district. This approach does a disservice to students subject to sexual harassment and provides an enormous insulation for educational institutions.

1. Elementary and Secondary Students

In *Leija v. Canutillo Independent School District*,⁴⁷ a female student alleged sexual harassment by a male physical education teacher, who was incidentally a coach. On appeal, the Fifth Circuit rejected the district court's imposition of strict liability on the school district for the criminal actions of a male teacher toward a female student.⁴⁸ The court stated, "Simply put, strict liability is not part of the Title IX contract. In addition, there is no sound policy reason to hold a school district financially accountable, through strict liability, for the criminal acts of its teachers."⁴⁹ The court explained, "Strict liability converts the school district from being the educator of children into their insurer as well."⁵⁰ Instead, the Fifth Circuit required utilization of the Title VII hostile environment standard, whereby the school district could be liable if it had actual or constructive knowledge. The homeroom teacher, told of the alleged abuse, did not possess the requisite authority to satisfy the notice

F.3d 393 (5th Cir. 1996), *reh'g denied*, (Jan. 8, 1997) (suggestion for rehearing en banc also denied), *cert. denied*, 520 U.S. 1265 (1997); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 887 F. Supp. 140 (W.D. Tex. 1995), *rev'd*, 106 F.3d 648 (5th Cir. 1997); *Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins. Co.*, 900 F. Supp. 844 (W.D. Tex. 1995), *on appeal*, 101 F.3d 393 (5th Cir. 1996) (concerning the issue of coverage by a liability insurance policy issued to the school district charged with teacher—student sexual harassment).

45. See, e.g., *Franks v. Ky. Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998) (reviewing whether there was Eleventh Amendment immunity, which insulated a private individual from suing a state entity in federal court); *Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996) (applying agency principles involved in a Title VII action to a claim brought pursuant to Title IX involving sexual harassment of a student by a teacher). See also *Stilley v. Univ. of Pittsburgh*, 968 F. Supp. 252 (W.D. Pa. 1996).

46. *Smith v. Metro. Sch. Dist.*, 128 F.3d 1014 (7th Cir. 1997), *cert. denied*, 524 U.S. 951 (1998).

47. 887 F. Supp. 947 (W.D. Tex. 1995), *rev'd and remanded*, 101 F.3d 393 (5th Cir. 1996), *reh'g & suggestion for reh'g en banc denied* (Jan. 8, 1997), *cert. denied*, 520 U.S. 1265 (1997). See also *Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins. Co.*, 900 F. Supp. 844 (W.D. Tex. 1995), *rev'd*, 99 F.3d 695 (5th Cir. 1996). This lawsuit was a companion case, based on the underlying facts involved in *Leija*.

48. *Leija*, 101 F.3d 393 (5th Cir. 1996).

49. *Id.* at 399.

50. *Id.* at 400.

provision imputed to a “management-level” position.⁵¹ The court stated, “Therefore, before the school district can be held liable under Title IX for a teacher’s hostile environment sexual abuse, someone in a management-level position must be advised about (put on notice of) that conduct, and that person must fail to take remedial action.”⁵² The Supreme Court denied certiorari in 1997.⁵³

A fifteen-year-old female high school student brought a Title IX lawsuit in *Rosa H. v. San Elizario Independent School District*⁵⁴ against her school district for sexual abuse by her after-school karate instructor, a twenty-nine-year-old male,. The Texas jury awarded the plaintiff \$300,000.00 in damages. The Fifth Circuit again rejected a strict liability standard for a teacher’s sexual abuse of students. Instead, the court applied this standard:

In order to hold a school district liable under Title IX for teacher-student sexual harassment based on a hostile educational environment, a plaintiff must show that an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.⁵⁵

The court continued, ruling:

We hold that when a teacher sexually abuses a student, the student cannot recover from the school district under Title IX unless the school district actually knew that there was a substantial risk that sexual abuse would occur. In requiring actual knowledge, we reject the district court’s theory that agency law can substitute imputed discriminatory intent for actual discriminatory intent in Title IX cases.⁵⁶

The court further underscored, “It is important to note that agency principles would create liability for school districts in virtually every case in which a teacher harasses, seduces, or sexually abuses a student.”⁵⁷ Furthermore, since Title IX was passed pursuant to the Spending Clause, then it “should not generate liability unless the recipient of federal funds agreed to assume the

51. *Id.* at 402.

52. *Id.* at 401.

53. *Leija*, 520 U.S. at 1265.

54. 887 F. Supp. 140 (W.D. Tex. 1995), *rev’d*, 106 F.3d 648 (5th Cir. 1997).

55. *Rosa H.*, 106 F.3d at 648.

56. *Id.* at 652-53.

57. *Id.* at 655.

liability.”⁵⁸ The court stated, “Whether the school official is a superintendent or a substitute teacher, the relevant question is whether the official’s actual knowledge of sexual abuse is functionally equivalent to the school district’s actual knowledge.”⁵⁹

In a matter of first impression, the Seventh Circuit in *Smith v. Metropolitan School District Perry Township*⁶⁰ disregarded utilization of an agency concept to hold an educational institution liable under Title IX based on actions of a teacher toward a student. Instead, the Seventh Circuit would apply liability “[o]nly if a school official who had actual knowledge of abuse was invested by the school board with a duty to supervise the employee and the power to take action that end such abuse and failed to do so”⁶¹ Smith’s “reliance on Section 219(2)(d) is misplaced for another reason - it creates strict liability and strict liability cannot form the basis for a monetary award in a suit brought pursuant to Spending Clause legislation.”⁶²

The following cases illuminate the issue at the district court level.⁶³ The lawsuit, *Does v. Covington County School Board*,⁶⁴ involved allegations of sexual harassment involving a male teacher with male students. In determining what standard should be applied, the Alabama District Court stated:

The Court finds that actual notice of potential abuse is sufficient to establish, *prima facie*, that the Board had notice that the Does were being harassed. The Court does not believe that an educational institution should be absolved of liability simply because a parent fails to wait until he or she has concrete evidence of abuse to report to school authorities. Sexual abuse and harassment should be detected and halted at the earliest possible opportunity, preferably before it

58. *Id.* at 654.

59. *Id.* at 660.

60. 128 F.3d 1014 (7th Cir. 1997).

61. *Id.* at 1034.

62. *Id.* at 1029 (quoting *Rosa H.*, 106 F.3d at 660).

63. See e.g., *Roe v. New Phila. Pub. Sch. Bd. of Educ.*, 996 F. Supp. 741 (N.D. Ohio 1998) (male student pleaded allegations of sexual harassment against a female teacher); *Buckley v. Archdiocese of Rockville Centre*, 992 F. Supp. 586 (E.D.N.Y. 1998) (female high school student alleged Title IX sexual harassment by a male teacher, a religious brother, at her parochial high school located within the archdiocese, but was rebuffed due to lack of Title IX jurisdiction). See Heckman, *Title IX Tapestry*, *supra* note 22 at 855, text accompanying notes 44-45 (discussing the issue of whether the school had been a recipient of federal funds).

64. 969 F. Supp. 1264 (M.D. Ala. 1997) (*Does II*). See also *Does v. Covington County Sch. Bd.*, 930 F. Supp. 554 (M.D. Ala. 1996) (*Does I*).

occurs.⁶⁵

The court also postponed ruling on another claim advancing peer hostile environment until the Supreme Court rendered its decision in *Davis v. Monroe County Board of Education*.⁶⁶

In *Seneway v. Canon McMillan School District*,⁶⁷ a female student asserted allegations of sexual harassment against her eleventh-grade teacher, who was incidentally the boys' head wrestling coach. The Pennsylvania District Court stated:

Although in *Franklin*, the Supreme Court did not directly address the issue of a school district's liability for the intentional acts of its teacher, the Court appears to indicate that it would impose liability on a school district under agency principles for intentional sex discrimination by its agent, the teacher.⁶⁸

In *Davis v. DeKalb County School District*,⁶⁹ the Georgia District Court absolved the school district of any Title IX liability where a prior investigation of a male physical education teacher led to his exoneration. Here the school district was unaware of any untoward actions by this teacher toward the female student-plaintiff. Herein, the two were engaged in playing touch football, where the teacher was the quarterback and the student was the center.

In *Leach v. Evansville-Vanderburgh School Corp.*,⁷⁰ the Indiana District Court granted the school's motion for summary judgment where a female high school student and member of the softball and basketball teams alleged a number of instances of improper physical contact by the male wrestling coach, who was also the plaintiff's physical education teacher, after the principal had specifically informed the teacher not to be alone in his office with female students.⁷¹ The physical education teacher would direct the student to come into his office, where he would inappropriately grab her breasts or buttocks or kiss her. He had even brought in mistletoe at one of the plaintiff's basketball practices and proceeded to hold it up over each girl's head and kiss everyone on the cheek.⁷² The presence of the girls' basketball coach was not disclosed during this incident. The plaintiff did not inform her mother or school

65. 969 F. Supp. at 1283.

66. 526 U.S. 629 (1999).

67. 969 F. Supp. 325 (W.D. Pa. 1997).

68. *Id.* at 335.

69. 996 F. Supp. 1478 (N.D. Ga. 1998).

70. 2000 WL 33309376 (S.D. Ind. May 30, 2000).

71. *Id.* at *1, 5.

72. *Id.* at *4-5.

personnel of the reputed sexual harassment.

The facts indicated that during the contemporaneous period, this teacher had sexually abused at least two other students and a female special education teacher. The special education teacher reported that the coach had tried to kiss her; apparently no action was taken against the coach. This was just before the first incident that the plaintiff complained of in her litigation.⁷³ As a result of investigating an incident concerning another female student, who the coach had told to come into his office and then proceeded to grope, the school learned about the plaintiff. The school immediately suspended the physical education teacher, who plead guilty to misconduct. The court concluded that even if the complaints by the other students and teacher constituted sufficient notice, the school's actions did not constitute deliberate indifference.⁷⁴

2. Post-Secondary Students

The cases profiled herein involve the purported actions of male professors.⁷⁵ The first case involved allegations of inappropriate sexual comments made by a male English professor at Iona College in New York toward two female students. The Second Circuit, in *Kracunas v. Iona College*,⁷⁶ noted that the professor "was most certainly acting as Iona's agent in his role of college professor."⁷⁷ It held, "College students should not receive less protection from conduct that is shown to be harassment (as opposed to teaching) than do employees in the workplace."⁷⁸ The appellate court advised, "Whether a particular school official is 'at a sufficiently high level of the hierarchy' depends on the facts of each case."⁷⁹ The court elaborated, "[I]f a professor has a supervisory relationship over a student, and the professor capitalizes upon that supervisory relationship to further the harassment of the student, the college is liable for the professor's conduct."⁸⁰

A thirty-three-year-old, female, Ph.D. student in psychology at Kent State University was required to complete an outside practicum as part of her doctorate program. The student was accepted at a program offered through Cleveland State University (CSU). She alleged in *Petrone v. Cleveland State*

73. *Id.*

74. *Id.* at *15.

75. See also *Miles v. N.Y. Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997).

76. *Pallett v. Palma*, 914 F. Supp. 1018 (S.D.N.Y. 1996), *vacated and remanded, sub nom. Kracunas v. Iona Coll.*, 119 F.3d 80 (2d Cir. 1997).

77. *Kracunas*, 119 F.3d at 87.

78. *Id.* at 88.

79. *Id.* at 90.

80. *Id.* at 88.

University⁸¹ that her male supervisor at CSU harassed her through inappropriate comments and placing his hand inappropriately on her leg. The student had received a favorable determination in the course. At her completion of the practicum, the program director invited the student to discuss the program, which she declined to do. She did not advise CSU of any alleged problem until three months later. The director was investigating another possible incident with this doctor. The supervising doctor submitted his resignation.⁸² The Ohio district court held that "[t]he Sixth Circuit has determined that Title VII agency principles apply to sexual harassment cases brought pursuant to Title IX."⁸³ However, "[t]he record in this case does not support a quid pro quo harassment claim."⁸⁴ As to a hostile environment claim, "[w]here the harasser is the plaintiff's supervisor[,] the plaintiff must establish employer liability under agency principles."⁸⁵ The court held that the plaintiff failed to establish a prima facie case of Title IX sexual harassment. The female student's reluctance to discuss the matter proved detrimental to her claim.⁸⁶

B. Supreme Court Decision in Gebser v. Lago Vista Independent School District: Silence is Golden

The Fifth Circuit, in *Doe v. Lago Vista Independent School District*,⁸⁷ imposed no Title IX liability on a school district, where the teacher involved in the alleged sexual harassment of a student was the only school employee aware of the situation, and the plaintiff presented no counter-evidence of notice. The court recognized that although the teacher's status aided in commission of the alleged misconduct, it was not sufficient to impose liability on the school district based on common law agency theories.⁸⁸ The student appealed.

On June 22, 1998, the Supreme Court rendered its opinion in *Gebser v. Lago Vista Independent School District*.⁸⁹ The Court, in a 5-4 decision, held

81. 993 F. Supp. 1119 (N.D. Ohio 1998). See *Donovan v. Mount Ida Coll.*, No. 96CV10289RGS, 1997 WL 259522 (D. Mass. Jan. 3, 1997).

82. *Id.* at 1122-23.

83. 993 F. Supp. at 1128 (citing *Doe v. Claiborne County*, 103 F.3d 495, 514 (6th Cir. 1996)).

84. *Id.* at 1129.

85. *Id.* (citing *Kauffman v. Allied Signal Inc.*, 970 F.2d 178, 183-84 (6th Cir. 1992)).

86. *Id.* at 1131.

87. 106 F.3d 1223 (5th Cir. 1997), *aff'd sub nom.* *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

88. *Doe*, 106 F.3d at 1226.

89. *Gebser*, 524 U.S. at 274 (1998) (5-4 decision) (Justices Stevens, Souter, Ginsburg and Breyer

that the school district must have actual notice of the sexual harassment before Title IX liability would be imposed due to improper teacher-student interaction.⁹⁰ The facts demonstrated that a male high school teacher met the female coed while he was an eighth-grade middle school teacher.⁹¹ The two became involved in a sexual relationship when the plaintiff attended high school. The student did not inform anyone at the school of the relationship.⁹² Some parents complained to the school principal of remarks made by the teacher in his classroom.⁹³ The principal warned the teacher about inappropriate comments, but he did not inform the school supervisor of the parents' complaints. Thereafter, the teacher was arrested for having sex with the student in a location off the school grounds. The school district did not have any official grievance procedure for lodging sexual harassment complaints, nor had it issued a formal anti-harassment policy.⁹⁴

Justice O'Connor wrote the opinion for the majority. The Court stated, "We conclude that damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."⁹⁵

The Court eschewed the Title VII agency standard because Title VII "explicitly defines 'employer' to include 'any agent,' § 2000e(b) Title IX contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles."⁹⁶ The Court distinguished Title VII from Title IX: "Thus, whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds."⁹⁷ The Court explained, "Applying those principles here, we conclude that it would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on

dissented). Interestingly, these four Justices, along with Justice O'Connor, would form the majority axis in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

90. *Gebser*, 524 U.S. at 292.

91. *Id.* at 277.

92. *Id.* at 278.

93. *Id.*

94. *Id.*

95. *Gebser*, 524 U.S. at 277.

96. *Id.* at 283. See *Frederick v. Simpson Coll.*, 149 F. Supp. 2d 826, 835 (S.D. Iowa 2001) (commenting that the Supreme Court in *Gebser* "[r]efused to expand liability under Title IX to include the concepts of respondeat superior or constructive notice that apply in Title VII cases.").

97. *Gebser*, 524 U.S. at 287. However, originally Title VII had no reference to compensatory amounts to be afforded aggrieved individuals. Both statutes were enacted to prohibit sex discrimination, so the alleged distinction seems nebulous.

principles of *respondeat superior* or constructive notice, *i.e.*, without actual notice to a school district official.”⁹⁸ Thus, the Court raised the bar by requiring actual notice rather than constructive notice. The Court noted, “As a general matter, it does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs.”⁹⁹ The Court highlighted, “Title IX’s express means of enforcement—by administrative agencies—operates on an assumption of actual notice to officials of the funding recipient.”¹⁰⁰

In reviewing the Title IX statutory language, the Court stated:

Because the express remedial scheme under Title IX is predicated upon notice to an “appropriate person” and an opportunity to rectify any violation, 20 U.S.C. § 1682, we conclude, in the absence of further direction from Congress, that the implied damages remedy should be fashioned along the same lines. An “appropriate person” under § 1682 is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination. Consequently, in cases like this one that *do not involve official policy* of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination, and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s programs and fails adequately to respond. We think, moreover, that the response must amount to deliberate indifference to discrimination.¹⁰¹

Section 1682 states in part:

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the

98. *Id.* at 285.

99. *Id.* The Court said indicia of this was the restriction that Congress placed on monetary damages for plaintiffs establishing Title VII causes of action. *Id.* at 285-86. However, before the ink was dry on that statement, the Court went on to identify that Title IX was modeled on Title VI. *Id.* at 286.

100. *Id.* at 288.

101. *Id.* at 290 (emphasis added).

particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.¹⁰²

Thus, the Court imposed a two-part requirement: first, an appropriate person must be put on notice, and secondly, the institution must have failed to adequately address the alleged discrimination.¹⁰³ Both components must be satisfied. The following discussion will address the first part of the equation.

Clearly, there is no statutory or regulatory definition of the words "appropriate person." Until this 1998 decision, there had been no judicial exploration interpreting this phrase. Nonetheless, the majority leapfrogged from the idea of having "actual notice to a school district official,"¹⁰⁴ to imposing its daunting definition of the "appropriate person," by creating the "super appropriate person." While the Court recognized that the statutory scheme explicitly set forth the administrative enforcement aspect, it identified no documents from either the Department of Education or its predecessor, the Department of Health, Education and Welfare, as to whom the executive departments deemed were appropriate persons. Interestingly, no exploration was done as to the agencies' actions. It would appear that many individuals could come under a natural interpretation of this term. It would seem that legal counsel for an educational institution would be deemed an appropriate person for administrative purposes, and yet according to the judicially-imposed definition, this individual would be ejected. But the argument is not with whether an attorney would or would not be included—it is with who, literally, must be placed on notice. Is the Court requiring that the student must literally inform the super-appropriate person? Or is notice to any other school employee sufficient, with the understanding that in the *in loco parentis* environment, telling a teacher about the actions of the offending school employee is sufficient?

Moreover, it must be stressed that the OCR, on behalf of the Department of Education, is not giving pre-notice; it is instead giving administrative due

102. 20 U.S.C. § 1682.

103. The district court in *Mercer v. Duke Univ.*, 181 F. Supp. 2d 525, 539-40 (M.D.N.C. 2001), described the standard as a three-prong test, indicating the following must be established: (1) it must involve an official of the educational institution, who at a minimum has authority to address the alleged discrimination and institute corrective measures on the recipient's behalf; (2) has actual knowledge of the alleged discrimination; and (3) responds with deliberate indifference.

104. *Gebser*, 524 U.S. at 285.

process notice that either an administrative complaint has been filed alleging a Title IX violation or that this educational institution, which is a recipient of federal funds, has been selected for a compliance review, whereby the OCR can randomly select any school without having any grounds whatsoever that a violation or even alleged violation has in fact occurred. This administrative notice is, according to the administrative scheme of enforcement, not a condition precedent, which the *Gebser* case is imposing. Thus, it is submitted that such notice provided by the administrative agency is procedural, rather than herein, where the notice provision was turned into a substantive notice requirement.

Has the Court forgotten the essence of the relationship between the school and the student, that it is acting *in loco parentis*, in place of the parent? What is most disconcerting is that the Court, while still requiring a condition precedent notice requirement, ignored the reality of the sexual harassment relationship, by not stating that any educational employee who learns of a possible sexual harassment incident involving another school employee is required to inform the administration. It is one thing to eschew application of a *respondeat superior* standard, that merely because one employee committed an act the educational institution should not automatically be held liable. However, it is another if the court does not deem actual notice by the "administration" when any school employee, other than the offending individual, has come to know of possible sexual administration, and that is not sufficient. All teachers and coaches should be charged with reporting such information to their supervisors, such as the school principals, who would likewise be charged with informing their supervisors, the superintendent of the school boards. Moreover, some of this activity not only would be sexual harassment, but could also enter the realm of child abuse, a reportable offense, which teachers are affirmatively charged with reporting through state statutes, as well as constituting criminal activity.

When the Supreme Court demands that the appropriate person be put on notice, does it mean literally or is there a *respondeat superior* aspect imputed with the actual transference of the knowledge? Thus, if the Court means that a school can be insulated—because the first grade student only informed another coach or teacher of the offending actions of another school employee, rather than directly telling the school superintendent—this is an unconscionable position. Is the Court's intention to construct a code of silence, whereby fellow teachers and coaches would not have to simply report the information to their superiors? Even herein, assuming that this student had informed the principal that a teacher was having sexual relations with her, she would still be required to satisfy the second aspect. Again, it is the contours of the first

component that is truly problematic. Not surprisingly, a dissent was filed.¹⁰⁵

C. Supreme Court Decision in Davis v. Monroe County Board of Education

There have also been a prodigious amount of decisions issued involving peer sexual harassment.¹⁰⁶ During May 1999, the Supreme Court issued its opinion concerning a claim of Title IX sexual harassment based on allegations of peer sexual harassment as the underpinning against the public school district. Therein, the fifth-grade female complained of offensive actions by a male fifth-grade student. She had informed her teachers about the offensive actions. One of the purported incidents occurred during a physical education class, where the plaintiff informed the physical education teacher. In *Davis v. Monroe County Board of Education*,¹⁰⁷ the Supreme Court stated:

[F]unding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.¹⁰⁸

The Court did not elaborate on the identity of the specific individuals within the educational institution that need to be apprised of the potential harassment. The dissent observed, "The majority's enunciation of the standard begs the obvious question: known to whom? Yet the majority says not one word about the type of school employee who must know about the harassment before it is actionable. The majority's silence is telling."¹⁰⁹

105. Justice Stevens wrote, "The rule that the Court has crafted creates the opposite incentive. As long as school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability." *Gebser*, 524 U.S. at 300-01 (Stevens, J., dissenting).

106. See Diane Heckman, *Tracing the History of Peer Sexual Harassment in Title IX Cases* (forthcoming Aug. 2003) (manuscript at 19, on file with the Marquette Sports Law Review) (exploring the *Davis* decision in greater detail, as well as reviewing post-*Davis* cases rendered).

107. 526 U.S. 629 (1999).

108. *Id.* at 650. The Court instructed, "Likewise, we declined the invitation to impose liability under what amounted to a negligence standard—holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have known*. Rather, we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge." *Id.* at 642.

109. *Id.* at 679 (Kennedy, J., dissenting).

D. Post-Gebser Decisions

In the post-*Gebser* era, courts are beginning to require the following to establish a *prima facie* case: (1) the individual plaintiff was subject to either *quid pro quo* or hostile environment sexual harassment in an educational program or activity that is a recipient of federal funds; (2) an educational institution official with the authority to take corrective measures had actual knowledge or notice of the sexual harassment; and (3) despite such knowledge, the educational institution official was deliberately indifferent to the sexual harassment and failed to reasonably respond.¹¹⁰ Other issues are emerging, including: what individual is the appropriate individual to be put on notice; what constitutes appropriate notice; and what will constitute deliberate indifference?¹¹¹

The cases cover all levels of education.¹¹² On the collegiate level, the first two cases dealt merely with language, while the others pertained to allegations

110. See e.g., *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 610 (8th Cir. 1999); *Morse v. Regents of the Univ. of Colo.*, 154 F.3d 1124, 1127 (10th Cir. 1998); *Frederick v. Simpson Coll.*, 149 F. Supp. 2d 826, 835 (S.D. Iowa 2001); *Gordon v. Ottumwa Cmty. Sch. Dist.*, 115 F. Supp. 2d 1077, 1081 (S.D. Iowa 2000).

111. See e.g., *Waters v. Metro. State Univ.*, 91 F. Supp. 2d 1287 (D. Minn. 2000) (investigation done after female filed a sexual harassment complaint concerning consensual sexual relations with a professor; while the court commented the investigation could have been a tad more thorough, it did not constitute deliberate indifference), *aff'd*, 2002 WL 31398959 (8th Cir. Oct. 17, 2002) (unpublished decision). See also *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000) (concerning what constitutes a reasonable response); *Gordon v. Ottumwa Cmty. Sch. Dist.*, 115 F. Supp. 2d 1077 (S.D. Iowa 2000) (concerning the adequacy of the school's response); *Niles v. Nelson*, 72 F. Supp. 2d 13 (N.D.N.Y. 1999) (finding that the deliberate indifference standard did not equate with a negligence standard under New York state law); *Morlock v. W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892 (D. Minn. 1999) (discussing the issue of whether the response was made in a prompt and timely manner).

112. See e.g., *Shrum v. Kluck*, 249 F.3d 773 (8th Cir. 2001) (concerning letter of recommendation made by one school, which another school relied upon in hiring a teacher. A male student at school district B alleged Title IX sexual harassment and a Section 1983 action based on the actions of a male teacher, who was recently employed by school district B. In the first case of its type under Title IX jurisprudence, the student sued both his school district (school district B), as well as the former school district (school district A). School district A had provided a favorable letter of recommendation as part of a confidential settlement whereby this teacher charged with numerous acts of possible sexual harassment agreed to leave the school. The Eighth Circuit reported that school district A was not liable for the sexual abuse allegedly perpetrated by the teacher toward the student at school district B.). See also *Becerra v. Asher*, 921 F. Supp. 1538 (S.D. Tex. 1996) (finding no liability on the school district in this Section 1983 action with allegations of sexual abuse by male music teacher of male eleven-year-old student schooled at home, where the plaintiff alleged the school adopted a policy of transferring pedophiles. *Id.* at 1544. The teacher plead guilty to child molestation and was sentenced to fifty years in prison.), *aff'd*, No. 9620401, 1997 WL 35402 (5th Cir. Feb. 14, 1997); *Anonymous v. Lyman Ward Military Acad.*, No. 2950915, 1997 WL 112730 (Ala. Civ. App. Mar. 14, 1997) (finding military academy was not liable for sexual molestation committed by an employee, where a background check was made of the employee).

of offensive actions by professors: all the cases involved activity of male professors toward female students. In *Gallant v. Board of Trustees of California State University*,¹¹³ a California district court found no Title IX violation based on allegations of a male professor's use of sexually graphic language in conversation with a Native American, lesbian, graduate student.¹¹⁴ On June 23, 1999 (Title IX's anniversary date), the Second Circuit, in *Miles v. New York University*,¹¹⁵ found that a male professor did sexually harass a male-to-female transsexual, but the university was not liable under Title IX.¹¹⁶

In *Burtner v. Hiram College*,¹¹⁷ a female college student alleged quid pro quo sexual harassment and hostile environment regarding unwanted sexual verbal utterances and touching by a male professor.¹¹⁸ The plaintiff had entered into a consensual sexual relationship with this professor. Prior to graduation, another female student had filed a complaint with the result that the professor was found to have sexually assaulted this second coed.¹¹⁹ However, the Ohio District Court found no liability by the college toward this plaintiff as the college did not learn of the incident until shortly before graduation, which constituted insufficient time to rectify the situation.¹²⁰

There remained a question of fact as to whether a post-secondary institution exhibited deliberate indifference in *Chontos v. Rhea*,¹²¹ involving a female student's allegations of sexual harassment by a male associate professor at Indiana University. The female student alleged being forcibly kissed and fondled during a private conference in the professor's office. Herein, the state university was aware of numerous incidents concerning this

113. 997 F. Supp. 1231 (N.D. Cal. 1998). See *Hartley v. Parnell*, 193 F.3d 1263 (11th Cir. 1999) (concerning whether a school district superintendent should be individually liable for a Title IX sexual harassment suit commenced by a female high school student based on allegations of sexual abuse by one of her teachers).

114. *Id.*

115. 182 F.3d 900 (2d Cir. 1999).

116. *Id.*

117. 9 F. Supp. 2d 852 (N.D. Ohio 1998). See also *Kraft v. Yeshiva Univ.*, 2001 WL 1191003 (S.D.N.Y. Oct. 5, 2001), concerning a male doctoral student's claim of retaliation based on failure to accept his initial dissertation and then a refusal to grant him an extension for a new dissertation topic where after he had defended his initial doctoral proposal he had allegedly ended a consensual sexual relationship with the female director of the doctoral program for the School of Social Work.

118. *Id.*

119. *Id.*

120. *Id.*

121. 29 F. Supp. 2d 931 (N.D. Ind. 1998). But see *Liu v. Striuli*, 36 F. Supp. 2d 452 (D.R.I. 1999) (concluding that even though other professors knew of a relationship between a male professor and female college student, this did not impute Title IX liability in this sexual harassment lawsuit where the student alleged rape, as the professors had no reason to know the relationship was not other than a consensual relationship).

professor that allegedly spanned a five-year period and it had originally reprimanded the professor and required this employee to attend counseling after the first reported incident. The university argued that prior alleged incidents were made by female students who elected not to pursue their complaints formally.¹²² This Indiana court denied the university's motion for summary judgment.¹²³

The following cases discuss incidents at elementary and secondary schools.¹²⁴ Two female fourth-grade students alleged sexual harassment by the male fifth-grade teacher due to his touching of the girls' breasts in *Doe v. Beaumont Independent School District*.¹²⁵ The girls indicated that the teacher draped his hand around both girls' shoulders on individual occasions and then moved his hand down lower.¹²⁶ One of the girls had complained to one of her teachers about the fifth-grade teacher but did not identify the alleged harassment.¹²⁷ One day while a substitute teacher was teaching, another girl came into the classroom crying, allegedly due to actions by the fifth-grade teacher.¹²⁸ The substitute teacher then asked the students to write down if they had had any incidents with this teacher.¹²⁹ The two plaintiffs wrote down their accounts with the fifth-grade teacher.¹³⁰ Immediately, the principal suspended the teacher, while criminal charges were pending against him. The teacher then submitted his resignation.¹³¹ This Texas federal court noted that

122. *Id.* at 935-36.

123. *Id.* at 939.

124. Other decisions were also rendered. On June 26, 1998, the Supreme Court denied certiorari in *Smith v. Metro. Sch. Dist.*, 128 F.3d 1014 (7th Cir. 1997), *cert. denied*, 524 U.S. 951 (1998). See *Doe v. Howe Military Sch.*, 227 F.3d 981 (7th Cir. 2000) (determining this Title IX lawsuit predicated upon sexual harassment against faculty did not comply with the applicable statute of limitations); *P.H. v. Sch. Dist. of Kan. City*, 265 F.3d 653 (8th Cir. 2001) (finding no liability where a male student did not inform the school of a sexual relationship with a male teacher that purportedly lasted two years); *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871 (5th Cir. 2000) (male middle school student originally claimed a Title IX violation against his school district due to allegations of excessive corporal punishment ordered by his male physical education teacher; however, the proponents later removed the Title IX claim); *Hartley v. Parnell*, 193 F.3d 1263 (11th Cir. 1999) (female high school student alleged Title IX sex discrimination against her school district due to her alleged sexual molestation by a male teacher. The Eleventh Circuit determined that the district superintendent was not subject to individual liability under Title IX. This is also in keeping with the normal stance that Title IX is directed toward the educational institution. See Heckman, *Title IX Tapestry*, *supra* note 22, at 866).

125. 8 F. Supp. 2d 596 (E.D. Tex. 1998).

126. *Id.* at 602.

127. *Id.* at 603.

128. *Id.*

129. *Id.*

130. *Doe*, 8 F. Supp. 2d at 603.

131. *Id.*

"[t]here is some evidence that prior sexual abuse accusations were leveled against [the fifth-grade teacher] in August of 1993."¹³² In reviewing the caselaw, the court found, "In the Fifth Circuit, there appears to be two possible theories under which a school district may be found liable in a Title IX action: actual notice or constructive notice."¹³³ However, in this case, the court found neither, stating, "In this case, Plaintiffs have provided no evidence that [the principal], the supervisory employee, should have known of the alleged sexual abuse."¹³⁴ Therefore, the court granted summary judgment as to all defendants on the Title IX cause of action.¹³⁵

The decision is rather remarkable. The plaintiffs were unsuccessful even as the school district purportedly took appropriate action after being informed, in that herein, the alleged perpetrator was immediately suspended upon his arrest. Obviously, the due process rights of all teachers and educational employees must be protected, especially where students could falsely accuse individuals of sexual harassment. However, herein, it is not clear if the court was insulating the school district because the principal was not directly told by the fifth-grade students or because the substitute teacher did not specifically inform the principal of what transpired that school day. To judicially condone the situation herein seems counter to the intent of Title IX.

In discussing the notice requirement, the Fourth Circuit in *Baynard v. Malone*,¹³⁶ informed, "To the extent there is any doubt about the nature of the actual notice requirement articulated in *Gebser*, it is removed by the subsequent opinion of the Court in *Davis*."¹³⁷ This appellate court thus concluded that adequate notice was not satisfied as concerned a public school principal involving allegations of sexual harassment by a teacher toward a student. The court found, "Although [the principal] certainly should have been aware of the *potential* for such abuse, and for this reason was properly held liable under § 1983, there is no evidence in the record to support that [the principal] was *in fact* aware that a student was being abused."¹³⁸ However, in a fascinating aside, the Fourth Circuit imputed a broad tangent of the notice requirement, stating:

[A] Title IX plaintiff is not required to demonstrate actual knowledge

132. *Id.* at 609.

133. *Id.* at 614.

134. *Id.* at 615.

135. *Doe*, 8 F. Supp. 2d at 616.

136. 268 F.3d 228 (4th Cir. 2001), *cert. denied, sub nom. Baynard v. Alexandria City Sch. Dist.*, 535 U.S. 954 (2002).

137. 268 F.3d at 238.

138. *Id.*

that a particular student was being abused. We believe that the actual notice requirement could have been satisfied, for example, if [the principal] had [sic] actual knowledge that [the teacher] was currently abusing one of his students, even without indication of which student was being abused.¹³⁹

The court also imparted its agreement with the Fifth Circuit as to “whether a supervisory employee may be viewed as the proxy of the school district depends upon whether the district has delegated to that employee the traditional powers of an employer, e.g., the authority to hire and terminate employees.”¹⁴⁰ The court concluded that the principal did not statutorily have this power, which was reserved pursuant to state law to the school district, even though the court recognized that the principal could submit recommendations about a teacher’s continued employment.¹⁴¹

While the Fourth Circuit would countenance notice of sexual harassment, even if it did not involve the specific plaintiff, the Southern District of New York in *Crandell v. New York College of Osteopathic Medicine*,¹⁴² informed that Title IX does not require that the subject individual must inform the educational institution of each incident of alleged sexual harassment. This court underscored:

Clearly, the institution must have actual knowledge of at least some incidents of harassment in order for liability to attach, as this is the thrust of *Gebser*. It is equally evident, however, that actual knowledge of every incident could not possibly be required, as this would burden the plaintiff unfairly in cases of frequent harassment to report many separate incidents to the appropriate authorities and would oblige the court to determine whether each incident alleged was reported and therefore is actionable This minimum standard is appropriate because it adopts *Gebser*’s focus on institutional culpability while not putting an unrealistically heavy burden on Title IX plaintiffs.¹⁴³

E. Claims Involving Coaches and Student-Athletes

With the increase in individuals participating in sports, the element of sexual harassment in athletics is a repugnant aspect, being brought to light

139. *Id.* at n.9.

140. *Id.* at 239 (citing *Rosa H.*, 106 F.3d at 660).

141. *Id.*

142. 87 F. Supp. 2d 304 (S.D.N.Y. 2000).

143. *Id.* at 320.

within the past decade.¹⁴⁴ Dr. Joel Fish, director of the Center for Sport Psychology in Philadelphia, stated, "There's more opportunity for female athletes than ever before, but the flip side is that there's [greater] risk to those athletes because we haven't developed policies, legislation, and screening [procedures] to keep up with the social progress made by Title IX."¹⁴⁵ An author and former female student-athlete opined, "In fact, sexual harassment and abuse of female athletes are part of the reality of women's sports."¹⁴⁶ A 2001 Houston Chronicle three-month investigation identified sixty-four Texas high school or middle school coaches who had lost their jobs due to allegations of sexual misconduct since 1996, with nineteen coaches entering into agreements with the State of Texas to surrender or have their teaching certificates revoked.¹⁴⁷ The National Collegiate Athletic Association (NCAA), with its myriad rules and regulations, has no sexual harassment policy that would prevent any sexual relationship between coaches and intercollegiate athletes.

On the intercollegiate level: On May 14, 1998, two female varsity tennis players commenced the lawsuit, *Ericson v. Syracuse University*,¹⁴⁸ seeking \$25 million in damages based on allegations of sexual harassment by their male tennis coach in violation of Title IX and another federal statute, the 1994 Violence Against Women Act.¹⁴⁹ A New York federal court had previously

144. See *R.L.R. v. Prague Pub. Sch. Dist.* I-103, 838 F. Supp. 1526 (W.D. Okla. 1993) (for an examination of the first Title IX lawsuit based on allegations of sexual harassment of a female athlete by her male coach). See Heckman, *Defining the "Equal Opportunity" Standard*, *supra* note 16, at 1019-20 (discussing the *R.L.R.* case). See also Heckman, *Sex Discrimination in the Gym*, *supra* note 16, at 624-26 (for a discussion of other earlier decisions involving actions by coaches toward student-athletes).

145. Robin Finn, *Growth in Women's Sports Stirs Harassment Issue: [Special Report]*, N.Y. TIMES, March 7, 1999, at 1, 24. Generally, these matters concern allegations brought by females against male coaches; however, female coaches are not exempt from implication in this category. Additionally, males have also been subject to sexual harassment by male coaches.

146. Leslie Heywood, *Despite the Positive Rhetoric About Women's Sports, Female Athletes Face a Culture of Sexual Harassment*, CHRON. HIGHER EDUC., Jan. 8, 1999, at B4. See also Leslie Heywood, *Female Harassment is Still Widespread in Sport*, N.Y. TIMES, § 8, Nov. 8, 1998, at 11 (referring to her new book, *PRETTY GOOD FOR A GIRL*). See Heckman, *Sex Discrimination in the Gym*, *supra* note 16, at 624-26 (detailing coach—student-athletes sexual harassment cases).

147. See Associated Press, *Sexual Misconduct by Coaches in Texas: 64 Cases*, NEWSDAY, Apr. 22, 2001; Editorial, *"Out of Bounds;" Abuse in Schools Must Be Recognized as Problem*, HOUSTON CHRON., Apr. 29, 2001, at 2.

148. 35 F. Supp. 2d 326 (S.D.N.Y. 1998) (trial was scheduled to begin during March 1999). "After a university panel recommended a two-year ban of [the tennis coach] in 1997, finding that he had violated sexual harassment and discrimination policies, the punishment was reduced to a three-month suspension." Robin Finn, *Harassment Becomes Concern as Women's Sports Keep Growing*, N.Y. TIMES, Mar. 7, 1999, at 1.

149. 42 U.S.C. § 13981. See *United States v. Morrison*, 529 U.S. 598 (2000) (concluding this

ruled that an intracorporate conspiracy doctrine prevented the coeds from pursuing a claim that the university's counsel and a student member of the hearing panel had acted improperly.¹⁵⁰ However, the court found that based on the evidence presented, the university had actual notice of harassment of female athletes for an extended period, but took no steps to remedy the situation, which constituted sufficient grounds to make out a prima face case for purposes of the new standard the Supreme Court imposed in the *Gebser* case.¹⁵¹ The district court recognized:

The mere failure of an institution to promulgate a grievance procedure for dealing with discrimination does not necessarily imply its knowledge of any given instance of discrimination. By contrast, the purposeful failure of an official with actual knowledge of an employee's discrimination and the authority to remedy the misconduct to adequately respond is tantamount to 'an official decision by the [institution] not to remedy the violation.'¹⁵²

On the eve of trial, the parties settled the case for an undisclosed amount.¹⁵³

On August 25, 1998, two female former NCAA Division I collegiate soccer players instituted a \$12 million dollar lawsuit, *Jennings v. University of North Carolina at Chapel Hill*¹⁵⁴ based on allegations against their very successful, male, soccer coach. The coach denied the charges. In what appears to be a first in a Title IX case involving athletics, the female plaintiffs also alleged that certain assistant soccer coaches, also named as defendants, were aware of the alleged sexual harassing incidents.¹⁵⁵ Initially, the venue of

federal statute was unconstitutional in violation of the Commerce Clause).

150. *Ericson*, 35 F. Supp. 2d at 329.

151. *Id.* at 328. The trial court upheld the plaintiffs' claim that the cause of action alleging a transgression against the Violence Against Women Act was constitutional. *Ericson v. Syracuse Univ.*, 45 F. Supp. 2d 344, 348 (S.D.N.Y. 1999) (commenting, "Functionally, moreover, the *Brzonkala* court's view of the Commerce Clause considerably limits the ability of Congress to address the complex interaction of social and economic forces typical of the modern state." *Id.* at 347).

152. *Ericson*, 35 F. Supp. 2d at 328.

153. See Deborah Pines, *Federal Domestic Violence Law is Endorsed in Southern District*, N.Y.L.J., April 14, 1999, at 6.

154. No. 98C5261, 1999 WL 301669 (N.D. Ill. Apr. 30, 1999). See S.L. Price, *Anson Dorrance, The Legendary North Carolina Women's Soccer Coach, Is Sure He Understands What Makes A Female Athlete Tick, And He Has 15 National Titles To Prove It. So Why Are Two Former Tar Heels Suing Him For Sexual Harassment?*, SPORTS ILLUSTRATED, Dec. 7, 1998, at 86. Dorrance is deemed the most successful NCAA women's soccer coach. Grant Wahl et al., *Passion Plays*, SPORTS ILLUSTRATED, Sept. 10, 2001, at 58.

155. *Jennings v. Univ. of N.C.*, 240 F. Supp. 2d 492, 502 (M.D.N.C. 2002).

the court was changed.¹⁵⁶ Four years after the initiation of the lawsuit, a North Carolina district court issued a decision as to the defendants' motions to dismiss the complaint based on individual causes of action alleged, as well as collectively.¹⁵⁷

In *Klemencic v. Ohio State University*,¹⁵⁸ a female former student-athlete alleged Title IX quid pro quo sexual harassment when she refused the romantic advances of her former male collegiate track coach, whereupon the coach allegedly withdrew his offer for the plaintiff to train with his team and serve as an assistant coach. The graduate had informed the male athletic director of the coach's alleged actions. The coach admitted to the athletic director that he had asked the woman for a date.¹⁵⁹ The plaintiff argued that the university's actions amounted to attempted indifference.¹⁶⁰ On July 14, 1998, in a post-*Gebser* decision, the Ohio federal district court found the plaintiff did not meet the *Gebser* standard and, therefore, held the university was not liable for any Title IX violation.¹⁶¹

On the interscholastic level, in *Bostic v. Smyrna School District*,¹⁶² a male track coach allegedly began a sexual relationship with one of his female student-athletes, when she was fifteen-years-old. The relationship continued for over a year, with the coach admitting to having sex with this athlete on school property. The coach's wife had complained to the principal about the close relationship. The football coach had heard of rumors concerning the two, and saw the two standing so extremely close that he thought they were a student-couple. This coach reported the information to the assistant principal. There was apparently no follow-up by the school. Another teacher had informed the assistant principal of what she had heard. She was told the matter was being taken care of. The court concluded that the principal was an appropriate official to place on notice.¹⁶³ The court noted that even though the principal may not have known of the actual sexual affair between the coach

156. *Jennings*, 1999 WL 301669, at *1 (N.D. Ill. April 30, 1999) (agreeing to move the venue to a North Carolina district court, presumably where the university was located).

157. *See Jennings*, at *1.

158. 10 F. Supp. 2d 911 (S.D. Ohio 1998). *See Wahl et al.*, *supra* note 154, at 64-65 (describing this matter and indicating that the University had reportedly offered the runner \$370,000.00 to settle the matter, which was declined).

159. *Klemencic*, 10 F. Supp. 2d at 913.

160. *Id.* at 918.

161. *Id.* at 920-21.

162. No. 01-0261KAJ, 2003 WL 723262 (D. Del. Feb. 24, 2003) (the coach allegedly involved was subsequently arrested for having an illicit relationship with another student and was then arrested for his relationship with the plaintiff. He ultimately plead guilty concerning his conduct with the plaintiff).

163. *Id.* at *4.

and student, nonetheless:

[A] rational fact finder could indeed conclude that [the principal] did have, or certainly should have had, 'actual knowledge' of inappropriate conduct amounting to harassment of a student by a member of the school's staff, whether or not he knew that they had consummated their relationship with sexual intercourse. An administrator cannot turn a blind eye to a mounting stream of information showing that a staff member and student are engaged in an obviously inappropriate relationship. The evidence in this case can fairly be characterized as going well beyond a demonstration of the mere risk of harassing behavior.¹⁶⁴

The Arizona district court in *Jane Doe One v. Garcia*¹⁶⁵ denied the school district's and vice principal/athletic director's motion for summary judgment in a case brought by a female high school student based on allegations of sexual harassment by this male administrator.¹⁶⁶

164. *Id.*

165. 5 F. Supp. 2d 767 (D. Ariz. 1998).

166. For other cases concerning allegations of sexual harassment involving coaches or athletes: see *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997), *en banc decision, vacating earlier circuit decision*, 169 F.3d 820 (4th Cir. 1999), *cert. granted*, 527 U.S. 1068 (1999), *sub nom.* *United States v. Morrison*, 529 U.S. 598 (2000) (female student, who was a member of the women's softball team, alleged Title IX sexual assault by male football players); *Canty v. Old Rochester Reg'l Sch. Dist.*, 54 F. Supp. 2d 66 (D. Mass. 1999) (female high school student sought compensatory and punitive damages against the school district based on her alleged rape by a male coach on school property), 66 F. Supp. 2d 114 (D. Mass. 1999) (denying the school district's motion for summary judgment attributable to the compensatory damages claim, but granting the motion as to the dismissing of the punitive damages action claim); *Burnell v. Williams*, 997 F. Supp. 886 (N.D. Ohio 1998) (Section 1983 action involving sexual contact between a male coach and female student); *Divergilio v. Skiba*, 919 F. Supp. 265 (E.D. Mich. 1996) (finding no section 1983 standing for the parents based on allegations regarding male gym teacher who exposed himself to a male student. 42 U.S.C. § 1983); *Kuhn v. Youtlen*, 692 N.E.2d 226 (Ohio App. 1997) (state appellate court affirmed the lower court's granting of summary judgment to the city board of education, which owned a public ice skating rink, the city recreation department and the private skating club in this case brought by a female ice skating student who alleged a male ice skating instructor had sexually molested her); *Landreneau v. Fruge*, 676 So. 2d 701 (La. App. 3d Cir. 1996) (female student alleged tortuous conduct against the principal and school board based on alleged sexual action by the plaintiff's female coach and physical education teacher); *Sormani v. Orange County Cmty. Coll.*, 659 N.Y.S.2d 507 (App. Div. 1997) (female clerical worker alleged sexual harassment by a male basketball coach); *Bratton v. Calkins*, 870 P.2d 981 (Wash. App. 1994) (finding a purported sexual relationship between a teacher/coach and student was not within the scope of the teacher's employment). *See also, supra* note 42 (wherein a number of the teachers charged with sexual harassment were incidentally also athletic coaches).

F. Individual Employees and Whether They Are Appropriate Individuals to Place on Notice

The issue of who is an appropriate individual employee to place on notice of the alleged sexual harassment is beginning to be fleshed out.

In *Murrell v. School District No. 1*,¹⁶⁷ a case involving peer sexual harassment commenced by a developmentally and physically-disabled female student against another special education male student, the Tenth Circuit stated, "It is possible that these teachers would also meet the definition of 'appropriate persons' for the purposes of Title IX liability if they exercised control over the harasser and the context in which the harassment occurred."¹⁶⁸

A number of district courts have voiced opinions. Cases dealing with the elementary or secondary level are presented first. In *Miller v. Kentosh*,¹⁶⁹ the school did not learn of the improper sexual relationship between a male teacher and the female high school student until the teacher was arrested after authorities found the couple engaging in sexual relations in a car. The teacher was immediately fired due to this incident. The student alleged that other teachers knew of the relationship. The court found that the teachers could not be considered "officials with authority to take corrective action."¹⁷⁰ Thus, the Pennsylvania District Court, after applying the *Gebser* standard, found no Title IX liability regarding the school. In *Morlock v. West Central Education District*,¹⁷¹ a female student informing the assistant principal that a male teacher had told her that she was the "sexiest boy" he had ever seen and that the teacher engaged in inappropriate conduct with her was sufficient notice.

On the collegiate level, the following opinions were issued. In *Liu v. Striuli*,¹⁷² the director of the financial aid department was not deemed an appropriate person, nor was the director of the graduate history department, as the harassment occurred within the department of modern languages. In *Litman v. George Mason University*,¹⁷³ the court stated, "*Gebser* did not

167. 186 F.3d 1238 (10th Cir. 1999).

168. *Id.* at 1248.

169. No. 97-6541, 1998 WL 355520 (E.D. Pa. June 29, 1998). See generally *Fort Wayne Educ. Ass'n v. Fort Wayne Cmty. Schs.*, 753 N.E.2d 672 (Ind. Ct. App. 2001) (ruling male teacher did not sexually harass female student by showing her his nipple ring and adjusting his underwear in front of her).

170. *Miller*, 1998 WL 355520 at *7.

171. 46 F. Supp. 2d 892 (D. Minn. 1999).

172. 36 F. Supp. 2d 452 (D.R.I. 1999).

173. 131 F. Supp. 2d 795 (E.D. Va. 2001).

discuss who might be an official with such authority.”¹⁷⁴ This court found that notice to another professor of sexual harassment activity did not constitute an appropriate person. In *Frederick v. Simpson College*,¹⁷⁵ the court found that the notice to the chair of the department where the offending professor taught or notice to the assistant dean of that department would be deemed appropriate individuals –presumably because both could discipline this professor.¹⁷⁶

IV. TITLE IX SEX DISCRIMINATION IN EDUCATIONAL ATHLETIC PROGRAMS AND ACTIVITIES

It is uncontroverted that the responsibilities and duties of educational employees, whether teachers, coaches, administrators, or others, do not include engaging in sexual harassing behavior. Whether these employees have a legal duty, as opposed to an ethical one,¹⁷⁷ to place their superiors on notice of the purported sexual harassment activities remains unresolved. This goes to situations where the teacher or coach is directly informed by a student of allegations of sexual harassment by another school employee or where the teacher views or comes in contact with activity clearly going beyond the normal bounds of teacher-student interaction, such as another teacher kissing a student on the lips in the hallway after school, or seeing a coach and student-athlete walking hand-in-hand in a park on a weekend. In New York, state law provides that certain designated educational employees, such as teachers, who have reasonable cause to believe elementary and secondary students under the age of twenty-one are alcohol or substance abusers or substance dependent, who report such suspicions, “shall have immunity from any civil liability that might otherwise be incurred or imposed as a result of the making of such a report.”¹⁷⁸ Clearly, the Title IX statute could also be revised to provide such

174. *Id.* at 798.

175. 149 F. Supp. 2d 826 (S.D. Iowa 2001).

176. *Id.* at 837.

177. See generally CAROL ALBERTS, COACHING ISSUES AND DILEMMAS: CHARACTER BUILDING THROUGH SPORT PARTICIPATION (2003) (examining ethical issues in amateur athletics).

178. N.Y. EDUC. LAW § 3028-a (McKinney 2003). The law does not specifically designate coaches for this protection. *Id.* Whether this statute is constitutional remains to be seen in terms of its Big Brother-like aspect of now having teachers also be the monitors for drug usage or alcohol usage by the public school students of the state. Have all parental functions been co-opted by the educational institution? However, the provision is interesting as it is cognizant of the litigious climate. At this juncture, the Supreme Court in *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995), has sanctioned drug testing of student-athletes attending public schools and in *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) upheld drug testing of public school students involved in “competitive” extracurricular activities. See Diane Heckman, *The Evolution of Drug Testing of Interscholastic Athletes*, 9 VILL. SPORTS & ENT. L.J. 209 (2002).

protection.

While Title IX prohibits sexual harassment within the definition of sexual discrimination, the Supreme Court has imposed a tough standard in order for the potential student to advance a claim of Title IX sexual harassment against the educational institution for monetary damages for such egregious activity. The Court has imposed a notice requirement that in order for a claim to go forward, the potential plaintiff must have first put the appropriate individual on notice that such unsanctioned action or actions have occurred, so that the educational institution may take corrective actions immediately to end such untoward actions. The statute and regulations were devoid of any explicit language as to the issue of sexual harassment. Obviously, claims of sexual harassment within the athletic department would be governed by the Supreme Court decisions in *Gebser* and *Davis*.

The next inquiry is whether a notice provision should also be imposed on claims of Title IX sex discrimination in athletic programs or activities when not involved with sexual harassment.

A. The Nature of the Administration of Athletic Programs

While Title IX pertains to the provision of physical education classes,¹⁷⁹ there has been no caselaw in the intervening thirty-one years as to the conducting of these classes.¹⁸⁰ However, there has been a significant number of cases advanced during this time as to extracurricular athletic programs provided.¹⁸¹ The factors within the administration of the interscholastic and intercollegiate athletic programs are known commodities, unlike the actions of teachers and coaches engaged in improper sexual activities, which routinely are committed in private. While secrecy may shroud improper sexual behavior,¹⁸² this is not the case for the administration of athletic programs.

179. 34 C.F.R. § 106.34. See Heckman, *The Glass Sneaker*, *supra* note 1, at 559-60.

180. See Heckman, *The Glass Sneaker*, *supra* note 1, at 559.

181. See generally, Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391, 398 n.34, 420 n.142 (1997) [hereinafter Heckman, *Scoreboard*]; Heckman, *Sex Discrimination in the Gym*, *supra* note 16, at 564-92.

182. See *Gebser*, 524 U.S. at 278 (describing that the sexual relationship between the male teacher and female student often occurred during class time, although never on school property). If a medical student was reluctant to notify administrators of alleged harassment, it can be extrapolated that the reluctance of a girl or young woman is even more pronounced. See *Crandell v. N.Y. Coll. of Osteopathic Med.*, 87 F. Supp. 2d 304 (S.D.N.Y. 2000) (concerning a female medical student, who alleged sexual harassment by a number of her teachers). After one particular incident of a physician allegedly rubbing his genital area against the adult woman, the court noted, "After this incident, plaintiff felt humiliated, violated and fearful that there could be a negative effect on her medical career, given the cardiologist's prominence at [the medical school] and in the broader medical

While the date when imposition of sexual harassment would be within the Title IX penumbras could be argued, it was clear that Title IX covered extracurricular athletic programs since the enactment of the regulations in 1975.¹⁸³ Unlike with sexual harassment, which is never condoned, the directors of athletic departments would or should be aware of the parameters and nature of the extracurricular athletic activities, including: the number of athletic participants broken down by sex; the number of sports offered; the budgets for the programs; the conditions and locations of the athletic contests; the equipment and supplies provided; the number of coaches, assistant coaches, trainers, and other staff; as well as the other myriad components. Additionally, on the collegiate level, the issuance of athletic scholarships is a known commodity. There is another federal statute that may be applicable, demanding the identity of salient aspects concerning the administration of intercollegiate athletic programs.¹⁸⁴ Moreover, intercollegiate athletic programs must be in compliance with rules governing athletic associations, which may have provisions directed toward gender equity. Likewise, the administration and the respective governing boards should be aware of the extracurricular athletic programs provided, due to budgetary aspects involved and hiring decisions.

Athletics is one of the few areas within the entire educational paradigm where single-sex activities may be provided.¹⁸⁵ All boards and athletic directors are or should be aware if separate extracurricular athletic programs are provided for males and females. They should also be aware of the history of their programs in terms of the expansion or constriction of the sports teams.

community. In consequence, she did not report this experience to anyone at [the medical school].” *Id.* at 308; *Leach v. Evansville-Vanderburgh Sch.*, 2000 WL 33309376 (S.D. Ind. May 30, 2000) (A female high school student and member of the softball team alleged sexual harassment committed by the male wrestling coach, who was also her physical education teacher. She indicated that after the teacher reportedly grabbed her breasts in his office, “she did not tell anyone what had happened because she was ashamed.” *Id.* at *2. After another incident, when the teacher called her into his office during her physical education class and again grabbed her breasts and buttocks and kissed her, the student commented, “[s]he didn’t tell anyone because she was afraid it might upset her mother and she didn’t think anyone would believe her.” *Id.* During both incidents, the plaintiff had attempted to stop the physical contact and voiced her lack of consent by telling him no and that she did not want anything to do with this type of relationship. According to the testimony, this did not dissuade the coach.).

183. 34 C.F.R. pt. 106. See *Nat’l Collegiate Athletic Ass’n v. Califano*, 444 F. Supp. 425 (D. Kan. 1978), *rev’d*, 622 F.2d 1382 (10th Cir. 1980) (representing the first legal challenge to the Title IX regulations).

184. See *Equity in Athletics Disclosure Act*, 20 U.S.C. § 1092(e) (2000), discussed within.

185. 34 C.F.R. § 106.41(b)(2002). In traditional educational curriculums, certain vocal musical programs may also provide single sex programs. 34 C.F.R. § 106.34(f). See also Section 901(9), 20 U.S.C. § 1681(9) (exempting pageants from having to be coed).

Therefore, the question arises: Is notice affirmatively required for these types of Title IX cases; or if so, is the notice already implied when dealing with the traditional claims of sex discrimination involving athletics?

Claims of Title IX sex discrimination in extracurricular athletics generally fall into three main areas.¹⁸⁶ The first area is known as "cross-over" cases. It pertains to the inability by a student of one sex to participate on the team composed solely of members of the other sex as the potential student-athlete wants to cross-over onto a team provided. At the very least, the head coach of every team would know of this incident, as it is routine that a coach is empowered to determine the composition of the final team, when it is based on tryouts.¹⁸⁷ Thus, when only one team is offered, for example, an all-boys soccer team, and no soccer team is offered for females, it would be known by the coach of the boy's team that a female tried out for the team and was not placed on the team. The athletic director, if not informed by his coach that a member of the opposite sex tried out, would nevertheless know that the school was not offering a soccer team for females.

The second area concerns the failure to supply "equal opportunity." This may involve the failure to upgrade club teams to varsity teams, the elimination of established varsity teams, or the failure to supply equal benefits in the provision of separate athletic programs for males and females. Again, the decision of a school to eliminate established varsity teams is known by the entire administration. The third area concerns the proper distribution of athletic scholarships to avoid trespassing against Title IX.

B. The Existence of Title IX Regulations Governing Athletic Programs and the Absence of Express Notice Requirements Within Those Regulations

It must be remembered that while the statute is also silent on mentioning athletics, there are two specific Title IX regulations pertaining to extracurricular athletic programs or activities.¹⁸⁸ None of the Title IX regulations governing athletics require an explicit notice requirement. Moreover, these regulations required congressional approval.¹⁸⁹ It should also be underscored that there have been no changes to any of the Title IX regulations since their inception in 1975.

Before discussion of the athletics-related regulations, it must be

186. See Policy Interpretation, 44 Fed. Reg. 71,413, which is broken down into three main areas.

187. See e.g., *Mercer v. Duke Univ.*, 181 F. Supp. 2d 525 (M.D.N.C. 2001). See Heckman, *Scoreboard*, *supra* note 181, at 398 n.34.

188. 34 C.F.R. §§ 106.37(c), 106.41 (2002).

189. See Heckman, *Women & Athletics*, *supra* note 19, at 12-13.

remembered that one regulation requires each recipient of federal funds to execute a compliance agreement with the federal government,¹⁹⁰ indicating that the educational institution is in compliance with Title IX (by not discriminating on the basis of sex in the educational programs and activities), in return for which the educational institution would receive federal funds. It states:

Every application for Federal financial assistance [for any education program or activity] shall as a condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that [each] program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.¹⁹¹

Even the Supreme Court in *Gebser* recognized that the interaction between the federal government and educational institution amounted “essentially to a contract.”¹⁹²

Then the regulations go on to identify specific items within the athletic department that must be complied with. It could be argued that these regulations place the school on notice as to the conduct of athletic programs and activities—as part of the contractual obligations. Thus, while introspection was needed to determine the standard for imposition of liability for sexual harassment cases, creating the phantom super-appropriate person, such would not be required for traditional athletics cases. Additionally, the regulations mandated that all recipients of federal funds were required to conduct a self-evaluation of their programs within one year of the effective date of the regulations.¹⁹³

The first regulation is entitled “Athletics.”¹⁹⁴ The first subpart tracks the

190. 34 C.F.R. § 106.4. The refusal to execute this agreement was the basis for the lawsuit in *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

191. 34 C.F.R. § 106.4.

192. *Gebser*, 524 U.S. at 286 (“The two statutes [Title VI and Title IX] operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.” *Id.*). Even the dissent, comprising of four Justices, stated, “Moreover, because respondent assumed the statutory duty set out in Title IX as part of its consideration for the recipient of federal funds, that duty constitutes an affirmative undertaking that is more significant than a mere promise to obey the law.” *Id.* at 297.

193. 34 C.F.R. § 106.3(c) (albeit the educational institution was only required to maintain such information on file for three years following the completion of the evaluation. 34 C.F.R. § 106.3(d)). There has been no caselaw on this issue. Query, whether this regulation could be presently enforced where a school never did the initial self-evaluation?

194. 34 C.F.R. § 106.41.

essential language in the statute.¹⁹⁵ It states:

(a) *General*. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.¹⁹⁶

The second subpart directs:

(b) *Separate teams*. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.¹⁹⁷

This part was notable for the institution of "cross-over" cases, whereby individuals of one gender wanted to participate on teams composed of members of the opposite gender.¹⁹⁸

The next subpart mandates:

(c) *Equal Opportunity*. A recipient that operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;

195. 34 C.F.R. § 106.41(a). See Heckman, *Scoreboard*, *supra* note 181, at 397-400.

196. 34 C.F.R. § 106.41(a).

197. 34 C.F.R. § 106.41(b).

198. See Heckman, *The Glass Sneaker*, *supra* note 1, at 563-66.

- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services; [and]
- (10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.¹⁹⁹

Moreover, the fourth subpart identified the time when the schools should be in compliance with the law, which directed that elementary schools had one year from the date the regulations were enacted in 1975, while secondary and post-secondary schools had three years to comply.²⁰⁰ Clearly, the time to comply has expired.

Another Title IX regulation provides:

(c) Athletic Scholarships.

(1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics. (2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.²⁰¹

On July 23, 1998, the OCR issued the following Guidance Letter concerning the distribution of athletic scholarships, stating:

If any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the 'substantially

199. 34 C.F.R. § 106.41(c).

200. 34 C.F.R. § 106.41(d).

201. 34 C.F.R. § 106.37(c).

proportionate' requirement.²⁰²

There has been minimal caselaw addressing this component.²⁰³

There is also the detailed 1979 HEW Policy Interpretation pertaining to athletic programs and activities,²⁰⁴ which includes the three-part "effective accommodation" test²⁰⁵ used to determine compliance with the first program area of the "equal opportunity" subsection found in the Title IX regulations; the 1996 OCR Policy Clarification; and 1998 OCR Guidance Letter. More recently, on July 11, 2003, the OCR Assistant Secretary Gerald Reynolds issued the letter, "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance," reaffirming its commitment to utilization of the three-part effective accommodation test. It stated, "Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX . . . and no one prong is favored."²⁰⁶ It further stated, "Second, OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice."²⁰⁷ There is a noticeable absence of any explicit notice requirement in these documents. Is the notice implied due to the conduct in administering these programs?

C. Other Disclosure Provisions

Would the following disclosure requirements also be sufficient to place universities and colleges on notice of the conduct of their programs?

1. Equity in Athletics Disclosure Act

There is another federal statute, the Equity in Athletics Disclosure Act,²⁰⁸

202. Letter from Dr. Mary Francis O'Shea, National Title IX Coordinator (July 23, 1998) (accompanying a letter from Hon. Norma Cantu, Assistant Secretary, OCR, U.S. Dep't of Educ. (July 23, 1998)) [hereinafter OCR Guidance Letter].

203. See Heckman, *The Glass Sneaker*, *supra* note 1, at 587-88.

204. Policy Interpretation, *supra* note 9. It should be noted that the Policy Interpretation is also designed to cover "club, intramural, and interscholastic athletic programs . . ." 44 Fed. Reg. at 71,413 at III.

205. 44 Fed. Reg. at 71,417.

206. Letter from the U.S. Department of Education, Office for Civil Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance 2* (July 11, 2003) [hereinafter *Clarification Letter*]. The complete text of *Clarification Letter* is included within this publication.

207. *Id.*

208. 20 U.S.C. § 1092(g) (2000) (requiring the submission of the required data on an annual basis since 1996). For the implementing regulations, see 34 C.F.R. §§ 668.41, 668.47 (2002) (Student Assistance General Provisions; Report on Athletic Program Participation Rates and

which imposes an annual mandatory disclosure of certain information by colleges and universities that have separate athletic programs for men and women. The statute requires disclosure by colleges and universities of the following: (1) athletic participation opportunities;²⁰⁹ (2) certain fiscal information concerning athletic departments,²¹⁰ including the money spent on athletic scholarships;²¹¹ (3) graduation rates of student-athletes, which is also broken down by race and gender, but not the individual identity of those involved;²¹² and (4) the gender of head and assistant coaches.²¹³ Disclosure is not presently required by primary or secondary educational institutions (K-12).

The implementing regulation requires that each post-secondary educational institution subject to the statute must issue a report containing the following information: (1) the number of male and female full-time undergraduate students that attended the institution;²¹⁴ (2) a listing of the varsity teams that competed in intercollegiate athletic competition; and for each team, the following data: (i) the total number of participants, by team, as of the day of the first scheduled contest of the reporting year for the team; and (ii) the total operating expenses attributable to those teams.²¹⁵ There exists no caselaw referencing situations: (1) where the college had complied with this law; (2) where there were discrepancies between the actual figures versus reported figures; or (3) where the failure to comply with this statute could be indicia for any notice requirement.

2. NCAA Certification Requirements

Additionally, the NCAA imposes myriad rules and regulations governing the conduct of such programs. The NCAA requires that Division I member colleges and universities must be certified. A component of the certification process is an explicit requirement concerning the issue of gender equity within that school's program.²¹⁶ Obviously, the school is required to prepare and

Financial Support Data).

209. 20 U.S.C. § 1092(g)(1)(A)-(B).

210. 20 U.S.C. § 1092(g)(1) (B)-(I).

211. 20 U.S.C. § 1092(g)(1)(D).

212. 20 U.S.C. § 1092(e).

213. 20 U.S.C. § 1092(g)(1)(B) (iii)-(iv).

214. The Title IX Commission on Opportunity in Athletics was listening to proposals to exclude individuals attending college who were over a certain age. See The Secretary of Education's Commission on Opportunity in Athletics, "*Open to All*," *Title IX at Thirty* (Feb. 28, 2003). The complete text of this report is included within this publication.

215. 20 U.S.C. § 1092(e). See Heckman, *Sex Discrimination in the Gym*, *supra* note 16, at 652.

216. See e.g., NCAA, *1996-97 Division I Athletics Certification Handbook*; Heckman, *Scoreboard*, *supra* note 181, at 407 n.75.

report on this aspect. The caselaw is also devoid of whether information formulated for such certification would be instrumental.²¹⁷

D. Administrative Redress for Athletic Complaints

Within the Title IX paradigm, an individual may pursue three avenues for redress. First, an individual can access the internal grievance process that every educational institution that is a recipient of federal funds is required to have.²¹⁸ The educational institutions are also required to designate a Title IX compliance officer.²¹⁹ Second, the individual can file an administrative complaint with the OCR within the Department of Education.²²⁰ An individual who files such an administrative complaint need not have standing,²²¹ and the identity of the complainant can be confidential.²²² When an administrative complaint is filed, the educational institution is placed on notice that a complaint has been filed.²²³ The OCR may also unilaterally select any educational institution that is a recipient of federal funds and investigate whether the athletics program is in compliance with Title IX,²²⁴ although the OCR historically has not chosen a significant number of schools for these compliance reviews.²²⁵ Unlike a lawsuit, a settlement is brokered

217. Parenthetically, in one case the NCAA had found the gender equity aspect was met where there was an ongoing Title IX lawsuit. See *Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000). See Heckman, *Sex Discrimination in the Gym*, *supra* note 16, at 580-84 (presenting the earlier litigation history of the case); Heckman, *The Glass Sneaker*, *supra* note 1, at 118-19 (relaying the current litigation history).

218. 34 C.F.R. § 106.8(b) ("A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.").

219. 34 C.F.R. § 106.8(a).

220. See DIANE HECKMAN, WOMEN'S SPORTS FOUNDATION REPORT ON TITLE IX, ATHLETICS AND THE OFFICE FOR CIVIL RIGHTS: AN EXAMINATION OF LETTERS OF FINDINGS ISSUED BY THE OFFICE FOR CIVIL RIGHTS IN THE POST-RESTORATION ACT ERA (1997), at 209-22 [hereinafter WOMEN'S SPORTS FOUNDATION REPORT] (examining letters of findings issued in regard to both administrative complaints filed and compliance reviews conducted by the OCR).

221. *Id.* at 7.

222. *Id.*

223. *Id.* at 1.

224. *Id.* at 25 (referring to the Policy Interpretation, 44 Fed. Reg. at 71,418).

225. Only seventy-nine compliance reviews were initiated against universities and colleges by ten regional offices for the period of March 22, 1988 to December 1, 1997, which averages to approximately eight per regional office over an approximate nine-year period. See Diane Heckman, *Title IX Activity Involving Collegiate Athletic Programs in the Post-Civil Rights Restoration Act Era* (Feb. 1, 2003) at 29-31 (on file with author) [hereinafter Heckman, *Title IX Activity*] (based on information supplied by the OCR, dated December 29, 1997, for the period March 3, 1988 to December 1, 1997, pursuant to a Freedom of Information Act (FOIA) request on file with the Women's Sports Foundation and Marquette Sports Law Review. See WOMEN'S SPORTS

between the OCR and the educational institution, without the complainant's acquiescence to the settlement, called a compliance action plan. The complainant would not be able to obtain monetary damages through the OCR for any violations, nor would immediate injunctive relief be an option if the administrative route is pursued. Additionally, there is a lack of consistency by different OCR regional offices in reviewing similar violations alleged.²²⁶

Notably, the *Title IX Athletics Investigator's Manual* specifically instructed on the scope of investigations involving interscholastic or intercollegiate athletic programs, not confining the investigation necessarily to the specific program area raised by the complainant, who files an administrative complaint. The equal opportunity subsection of the regulations enumerates ten specific program areas, although as indicated, the listing is not finite, as the OCR describes thirteen program components. As to the former, it informed:

In examining interscholastic athletic programs, the investigation "may be limited to those program components in which a complaint has made allegations" However, "[i]f during the investigation there is evidence to suggest that a disparity in a program component being investigated is the result of an apparent disparity in another program component that is not being investigated, then that program [area] should be investigated."²²⁷

Secondarily, the manual signaled:

The OCR use[s] an overall approach and review[s] the *total athletics program* for *intercollegiate athletics investigations*. This means that if OCR receives a narrowly drawn complaint for intercollegiate athletics, OCR will investigate all 13 program components . . . An investigation may be limited to less than all 13 of these major areas . . . where major circumstances justify limiting a particular investigation to one or two of these major areas.²²⁸

Thus, the filing of an administrative complaint was the ticket to broad investigatory powers regardless of whether the complainant had initially put the recipient of federal funds "on notice" of a problem in a specific program area of the extracurricular athletics program.

FOUNDATION REPORT, *supra* note 220, at 203 n.62.).

226. See WOMEN'S SPORTS FOUNDATION REPORT, *supra* note 220, at 182-92 (ch. 22: Summary of Findings).

227. *Id.* at 206 n.99 (referring to the U.S. Dep't of Educ. Office for Civil Rights, *Title IX Athletics Investigator's Manual* (1990), at 8).

228. *Id.* at 207 n.120 (referring to the U.S. Dep't of Educ. Office for Civil Rights, *Title IX Athletics Investigator's Manual* (1990), at 7).

It is not known if the OCR is requiring notice as a condition precedent to its post-*Gebser* investigations. The OCR can select any educational institution that receives federal funds. In any of those cases, the lack of affirmative notice of any potential violations would be absent by the very nature of the inquiry. Finally, an individual can commence a lawsuit against the offending educational institution, with the imposition of stare decisis and formalized due process.

E. The Gebser Directive

As the Court highlighted in *Davis*, “The high standard imposed in *Gebser* sought to eliminate any ‘risk that the recipient would be liable in damages not for its *own official decision* but instead for its employees’ independent actions.”²²⁹ Therein, Justice O’Connor underscored the contractual nature, stating, “When Congress acts pursuant to its spending power, it generates legislation ‘much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.’”²³⁰ Moreover, it must be remembered that the Supreme Court in *Gebser* restricted imposition of the notice requirement. It is not required when the discrimination “[does] not involve official policy of the recipient.”²³¹ Is this language sufficient to insulate the traditional athletics discrimination program from a notice requirement, as presumably the conduct of the athletics department involves an official policy of the recipient of federal funds?

During 2002, in an unpublished decision, the Eleventh Circuit affirmed a lower court decision in *Morris v. Wallace Community College-Selma*,²³² where the district court refused to apply the Supreme Court-imposed, hostile environment criteria in a Title VII action to a claim of general sex discrimination in failing to promote a white female to the position of athletic director at the college on two separate occasions where a white male and black male were hired. A Title IX claim and Equal Pay Act claim were also asserted in this lawsuit. Does this case serve as a general basis to distinguish the sexual harassment case from ones not involving sexual harassment?

229. 526 U.S. at 643 (citing *Gebser*, 524 U.S. at 290-91) (emphasis added).

230. *Id.* at 640 (quoting *Pennhurst St. Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

231. 524 U.S. at 290.

232. 125 F. Supp. 2d 1315, 1328 (S.D. Ala. 2001), *aff’d*, 2002 WL 518045 (11th Cir. Mar. 19, 2002). The district court stated, “Absent cogent argument from the defendants, the Court cannot conclude that the affirmative defense articulated in *Faragher* and *Ellerth* applies outside the harassment context.” *Id.* (citing *Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998)). See Heckman, *The Glass Sneaker*, *supra* note 1, at 556, n.24.

*F. Caselaw*1. *Grandson v. University of Minnesota*

The first imposition of a notice requirement in a traditional athletics case in a federal circuit court decision, appeared in *Grandson v. University of Minnesota*.²³³ A female student-athlete, who was a member of the women's soccer team, alleged Title IX discrimination for a number of reasons, including "discriminatory funding" of the women's intercollegiate athletics program and the failure to provide her with an athletic scholarship.²³⁴ A companion case, *Thompson v. University of Minnesota at Duluth*,²³⁵ was also commenced by three other female students against the state university for failure to provide equivalent athletic opportunities for female students, where separate athletic programs were provided for male and female student-athletes, and to provide an additional NCAA Division I women's team. The school offered seven varsity teams for men and seven varsity teams for women; all of the teams were classified as Division II with the exception of the men's hockey varsity team, which was a Division I team.²³⁶

OCR activity: Prior to the initiation of the lawsuit, an administrative complaint was filed with the OCR concerning the separate athletic programs provided for the male and female students.²³⁷ On April 2, 1997, a compliance action plan was negotiated between the OCR and the University.²³⁸ As part of the settlement, the University agreed to provide a Division I, women's ice hockey team. The University had already provided a Division I, men's ice hockey team.

District Court's determinations: Originally, the Minnesota District Court denied the university's motion to dismiss both actions. Then, the trial court judge ruled that the plaintiffs in *Grandson* and *Thompson* did not have standing to sue.²³⁹ The plaintiffs in both these cases filed appeals, which were

233. No. 97-265 PAM/JGL (D. Minn. March 16, 1998) (unpublished) (Magnuson, J.), *aff'd*, 272 F.3d 568 (8th Cir. 2001) (mandating such notice in the opinion dated November 20, 2001). See Heckman, *The Glass Sneaker*, *supra* note 1, at 574-76 (providing a detailed overview of the court action).

234. *Grandson*, 272 F.3d at 572.

235. No. 97-CIV1072 DSD/JMM (D. Minn. March 16, 1998) (unpublished) (Magnuson, J.), *appeal filed*, No. 99-1817 (appeal consolidated with the *Grandson* appeal). See Heckman, *The Glass Sneaker*, *supra* note 1, at 574-76 (providing a detailed overview of the court action).

236. *Grandson*, 272 F.3d at 572.

237. *Id.*

238. *Id.* at 571.

239. *Id.* at 571 (referring to the unpublished district court decision. "The court ruled that the four

consolidated.²⁴⁰ After initiation of the lawsuit, as part of the compliance action plan, the university formed a women's ice hockey team, which proved quite successful, winning the first NCAA women's ice hockey championship, held in 2001, offered in the school's division. Obviously, the female students had the requisite interest and ability.²⁴¹

Eighth Circuit's opinion: Finally, on November 20, 2001, the Eighth Circuit reviewed the main issues advanced in the two cases. The court agreed that the named plaintiffs did not have standing to pursue the lawsuit.²⁴² The plaintiffs sought to amend the Title IX lawsuit as a class action alleging unequal treatment of female student-athletes; the appellate court upheld the district court's decision, dismissing claims based on failure to timely serve a request for class certification.²⁴³ The court ruled that the plaintiffs' request in the *Thompson* case was satisfied as the university now provided a women's varsity hockey team.²⁴⁴ One plaintiff sought to amend the complaint to request monetary damages for failure to award her a soccer scholarship. The appellate court again affirmed that the lower court's denial of request to amend damages was proper "where the amended complaint made no allegation of prior notice of their complaints to appropriate university officials, no allegation of deliberate indifference by such officials, and no allegation that the student athletes afforded the university a reasonable opportunity to rectify the alleged violations."²⁴⁵

In light of the *Gebser* requirements, the students argued that actual notice of the Title IX discrimination came from students, women's groups, and the

plaintiffs lacked standing to seek injunctive relief because they had not played a varsity sport or had exhausted their NCAA eligibility." *Id.* at 573).

240. *Grandson*, 272 F.3d 568.

241. 34 C.F.R. § 106.41(c)(1).

242. 272 F.3d at 574 (indicating that three of the named plaintiffs had exhausted their NCAA eligibility and one had never played on a varsity team). If the plaintiffs did not have standing, then should the rest of the decision be deemed dicta? Considering that there was an approximately five year interim between the initiation of the lawsuit and the issuance of the appellate court's decision, this is not surprising). The litigants had placed the case on hold, while awaiting the Eighth Circuit's decision in another case. See Heckman, *The Glass Sneaker*, *supra* note 1, at 575 n.108. See *Cook v. Colgate Univ.*, 992 F.2d 17 (2d Cir. 1993) (whereby the merits of the case were not examined due to the graduation or exhaustion of NCAA eligibility by the named defendants). See also Heckman, *Defining the "Equal Opportunity" Standard*, *supra* note 16, at 967-71. The issue of elevating the women's club team to a varsity team was resurrected in the class action lawsuit, *Bryant v. Colgate Univ.*, 996 F. Supp. 170 (N.D.N.Y. 1998), which resulted in the formation of a women's varsity ice hockey team at the University, where a men's ice hockey team had been in existence for a long time. See Heckman, *Sex Discrimination in the Gym*, *supra* note 16, at 579.

243. *Grandson*, 272 F.3d at 574.

244. *Id.*

245. *Id.* at 575.

university's own employees.²⁴⁶ Not only did this appellate court impose the *Gebser* standard,²⁴⁷ rendered in 1998, but it narrowly circumscribed the notice requirement.

The Eighth Circuit stated, "When an individual plaintiff such as Grandson claims money damages from a specific Title IX violation, such as failing to award her a soccer scholarship, *Gebser* requires prior notice to a university official with authority to address the complaint and a response demonstrating deliberate indifference to the alleged violation."²⁴⁸ This appellate court specifically rejected certain actions as satisfying the notice requirement. The court found that the prior filing of an administrative complaint with the OCR was satisfactory.²⁴⁹

The court placed great deference on the fact that a compliance action plan had already been negotiated herein, and the OCR had found the university to be in compliance with the terms of the plan.²⁵⁰ The Eighth Circuit stated, "There have been a number of reported Title IX cases challenging women's collegiate athletic programs, but to our knowledge this is the first case in which (i) a class action was brought after the relevant federal funding agency lodged a broad overlapping complaint against the university . . ."²⁵¹ It is not uncommon for administrative complaints filed against colleges and universities to have the entire athletic program examined, taking into account the ten program areas listed in the "equal opportunity" subpart of the Title IX regulations.²⁵² There were two administrative complaints filed against the University of Minnesota at Duluth.²⁵³ The first complaint in *Grandson* was

246. See Heckman, *The Glass Sneaker*, *supra* note 1, at 575 n.108 (referring to Appellants' Reply Brief & Supplemental Addendum (June 28, 1999), at 3-4).

247. *Grandson*, 272 F.3d at 571. The court stated, "[w]e agree with the district court that the individual plaintiffs lack standing to seek injunctive relief, and that their damage claims do not satisfy the rigorous standards of *Gebser* . . ." *Id.*

248. *Id.* at 576.

249. *Id.* at 575.

250. *Id.* at 572.

251. *Id.* at 573. It was a private complainant who instituted the administrative complaint process; the OCR did not initiate a compliance review herein.

252. See WOMEN'S SPORTS FOUNDATION REPORT, *supra* note 220, at 207 n.120. Additionally, the aspects of support services and the recruitment of student-athletes is also regularly examined when post-secondary schools are investigated. See Policy Interpretation, 44 Fed. Reg. at 71,417 (detailing information about these two elements).

253. See Univ. of Minn., Duluth, No. 5-96-2125 (Apr. 3, 1997) (administrative complaint filed with OCR Region V), in Women's Sports Found., Freedom of Information Act Request (Dec. 29, 1993) [hereinafter WSF FOIA Request] (unpublished manuscript on file with the Marquette Sports Law Review) and Univ. of Minn., Duluth, No. 5-97-2086 (May 8, 1997) (AC), in WSF FOIA Request, *supra*. There was another administrative complaint filed against the University of Minnesota. See Univ. of Minn., No. 5-94-2233 (Feb. 14, 1996) (AC), in WSF FOIA Request, *supra*.

filed on February 3, 1997.²⁵⁴ However, it should be noted that it is not uncommon for individuals to file lawsuits contemporaneously or even after resolution by the executive agency. While all of the following may not fit the aforementioned criteria, and the examples do not purport to be all-inclusive; nevertheless, the following showcase that use of both the administrative route and litigation route were not mutually exclusive:

First, litigation was commenced at the following schools where compliance reviews (CR) were initiated or administrative complaints (AC) were filed: Alabama State University;²⁵⁵ Auburn University;²⁵⁶ California State University, at Fresno;²⁵⁷ California State University, at Fullerton;²⁵⁸ California State University, at Northridge;²⁵⁹ California State University, at Sacramento;²⁶⁰ City University of New York, Brooklyn College;²⁶¹ Colorado

See Heckman, Title IX Activity, supra note 225, at 33. The Eighth Circuit decision indicated that the university was placed on notice of the filing of an administrative complaint during September 1996. *Grandson*, 272 F.3d at 572.

254. *Grandson*, 272 F.3d at 572.

255. Ala. State Univ., No. 4-93-2167 (July 29, 1995) (AC), in Title IX Athletics Investigations 4 (Oct. 31, 1995) [hereinafter OCR Data] (unpublished data, on file with the Marquette Sports Law Review); Ala. State Univ., No. 4-96-2140 (Aug. 19, 1996) (AC), in WSF FOIA Request, *supra* note 253; Ala. State Univ., No. 4-97-2009 (Jan. 24, 1997) (AC), in WSF FOIA Request, *supra* note 253; *Beasley v. Ala. State Univ.*, 966 F. Supp. 1117 (M.D. Ala. 1997) (concerning the issuance of an athletic scholarship). *See also Beasley*, 3 F. Supp. 2d 1304 (M.D. Ala. 1998); *Beasley*, 3 F. Supp. 2d 1325 (M.D. Ala. 1998).

256. Auburn Univ., No. 4-89-6004 (July 20, 1989) (CR), in OCR Data, *supra* note 255, at 1; *Kiechel v. Auburn Univ.*, No. CV-93-V-474-E (M.D. Ala. 1993) (seeking elevation of club soccer to a varsity team for the female students; case settled during June 1993). *See Heckman, Defining the "Equal Opportunity" Standard, supra* note 16, at 990 (lawsuit commenced on April 14, 1993. *Id.*).

257. Cal. State Univ., at Fresno, No. 9-92-6006 (filed Apr. 20, 1992) (CR), in OCR Data, *supra* note 255, at 2, Cal. Nat'l Org. for Women v. Bd. of Trs., No. 949207 (Cal. Super. Ct. 1993) [hereinafter *Cal. NOW*]. *See Heckman, Defining the "Equal Opportunity" Standard, supra* note 16, at 993 (reviewing the case and settlement).

258. Cal. State Univ., at Fullerton No. 9-92-6007 (Aug. 7, 1992) (CR), in OCR Data, *supra* note 255, at 2; Cal. State Univ., at Fullerton, No. 9-94-2053 (Feb. 2, 1994) (AC), in WSF FOIA Request, *supra* note 253; *Cal. NOW*, No. 949207; *Howlett v. Gordon*, No. 701610 (Cal. Super. Ct. 1992); *Huffman v. Gordon*, No. 701610 (Cal. Super. Ct. 1992) (concerning the termination of the women's volleyball coach at the University). *See Heckman, Defining the "Equal Opportunity" Standard, supra* note 16, at 993 (reviewing the *California NOW* case and settlement), 992 (reviewing the *Howlett* case).

259. Cal. State Univ., at Northridge, No. 9-93-2087 (June 2, 1993) (AC), in WSF FOIA Request, *supra* note 253.

260. Cal. State Univ., at Sacramento, No. 9-91-2039 (Mar. 23, 1991) (AC), in WSF FOIA Request, *supra* note 253.

261. City Univ. of N.Y./Brooklyn Coll., No. 2-91-2013 (Feb. 14, 1992) (AC), in OCR Data, *supra* note 255, at 2; *Perdue v. City Univ. of N.Y.*, 13 F. Supp. 2d 326 (E.D.N.Y. 1998) (female seeking employment-based relief). The district court noted there was testimony concerning the alleged failure of the OCR to obtain full compliance with the compliance action plan. *Id.* at 335. *See*

State University;²⁶² Duke University;²⁶³ Illinois State University;²⁶⁴ Indiana University at Pennsylvania;²⁶⁵ San Jose State University;²⁶⁶ St. Lawrence University;²⁶⁷ Syracuse University;²⁶⁸ Tarleton State University;²⁶⁹ University of Arkansas;²⁷⁰ and the University of Bridgeport.²⁷¹

Heckman, *The Glass Sneaker*, *supra* note 1, at 588 n.166.

262. Colo. State Univ., No. 8-92-6001 (filed Aug. 4, 1992) (CR), in OCR Data, *supra* note 255, at 1; Colo. State Univ., No. 8-97-2089 (filed Jun. 4, 1997) (AC), in WSF FOIA Request, *supra* note 253. Additionally, on June 2, 1997, the National Women's Law Center (NWLC), long active in ensuring the rights of females in this area, filed Title IX administrative complaints against twenty-five of the nations' universities and colleges alleging violation in the distribution of athletic scholarships to female student-athletes including Colorado State University, wherein the OCR and the University agreed to increase women's scholarships herein. See Heckman, *Title IX Activity*, *supra* note 225, at 34-35. This was after the completion of the litigation in *Roberts v. Colo. State Bd. of Agriculture*, 998 F.2d 824 (10th Cir. 1993) (retention of the women's varsity softball team), *cert. denied*, 510 U.S. 1004 (1993). See Heckman, *Defining the "Equal Opportunity" Standard*, *supra* note 16, at 983-89. Litigation commenced on June 29, 1992. *Id.* at 983.

263. Duke Univ., No. 1-97-2045 (filed June 4, 1997) (AC), in WSF FOIA Request, *supra* note 253, (NWLC also filed an administrative complaint against Duke University, whereby increases for women's scholarships were to be made); *Mercer v. Duke Univ.*, 32 F. Supp. 2d 836 (M.D.N.C. 1998), *rev'd & remanded*, 190 F.3d 643 (4th Cir. 1999), *on remand*, 181 F. Supp. 2d 525 (M.D.N.C. 2001), *vacated in part*, 50 Fed. Appx. 643 (4th Cir. 2002) (athletic participation by female student on "coed" football team). See Heckman, *The Glass Sneaker*, *supra* note 1, at 564-66. See *infra* Section IV(F)(2).

264. Ill. State Univ., No. 5-95-2189 (Mar. 21, 1996) (AC), in WSF FOIA Request, *supra* note 253; *Harper v. Bd. of Regents*, No. 95-1371 (C.D. Ill. Nov. 13, 1995) (complaint filed) (brought by both male and female students), *on appeal*, *sub nom.* Boulahanis v. Bd. of Regents, 198 F.3d 635 (7th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000).

265. Ind. Univ. at Pa., No. 3-93-2001 (filed Oct. 8, 1992) (AC), in OCR Data, *supra* note 255, at 3; *Favia v. Ind. Univ. at Pa.*, 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993). See Heckman, *Defining the "Equal Opportunity" Standard*, *supra* note 16, at 972-75.

266. San Jose State Univ., No. 9-93-6007 (filed Apr. 27, 1992) (CR) in OCR Data, *supra* note 255, at 2; *Cal. Nat'l Org. for Women v. Evans*, No. 728548 (Cal. Super. Ct. Santa Anna County 1993) (complaint filed in 1993). See Heckman, *Defining the "Equal Opportunity" Standard*, *supra* note 16, at 993 (reviewing the case and settlement).

267. St. Lawrence Univ., No. 2-96-2011 (Jan. 31, 1996) (AC), in WSF FOIA Request, *supra* note 253; *Cooper v. Peterson*, 626 N.Y.S.2d 432 (N.Y. Sup. Ct. 1995) (male student-athletes contested the elimination of the men's varsity team).

268. Syracuse Univ., No. 2-97-2084 (July 9, 1997) (AC), in WSF FOIA Request, *supra* note 253; *Boucher v. Syracuse Univ.*, No. 95-CV-620RSP (N.D.N.Y. May 8, 1995) (commencement of class action by female students). See *Boucher v. Syracuse Univ.*, 1997 WL 328444 (N.D.N.Y. June 12, 1996), *on appeal*, 164 F.3d 113 (2d Cir. 1999). See Heckman, *Sex Discrimination in the Gym*, *supra* note 16, at 584-85.

269. Tarleton State Univ., No. 6-95-2001 (June 1, 1994) (AC), in OCR Data, *supra* note 255, at 6; *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997). See Diane Heckman, *Lowrey v. Texas A&M University System: Title IX vis-à-vis Title VII Sex Discrimination in Educational Institutions*, 124 EDUC. L. RPTR. 753 (1998).

270. Univ. of Arkansas, Pine Bluff, No. 6-89-2050 (Sept. 1, 1989) (AC), in WSF FOIA Request, *supra* note 253; *Caruso v. Broyles*, No. 93-5089 (W.D. Ark. 1993). See Heckman, *Defining the "Equal Opportunity" Standard*, *supra* note 16, at 994.

Second, the student's complaint to the director of the University of Minnesota at Duluth's (UMD) Office of Equal Opportunity,²⁷² was *after* she had quit the women's varsity soccer team.

Third, nor was UMD's alleged "[c]onsistently *unequal expenditures* for its men's and women's athletic teams . . . sufficient evidence of the deliberate indifference required by *Gebser*."²⁷³ Notably, the court did not mention whether the school was in compliance with 34 C.F.R. § 106.37(c), requiring "substantial proportionality" between the percentage of scholarships issued compared to the percentage of student-athletes of that same sex, which would by necessity have to take into account the financial outlay for the scholarships awarded.²⁷⁴ The Policy Interpretation stated, "This section does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value. It does mean that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates."²⁷⁵

Finally, numerous complaints the University had received "about the level of funding for women's athletics and the lack of women's varsity teams in sports such as swimming, ice hockey, and cross-country skiing."²⁷⁶ The court was dismissive of this material, commenting, "A vigorous public debate on these issues does not demonstrate that UMD knew of systemic non-compliance."²⁷⁷ Parenthetically, there was no mention of whether the University had complied with the Equity in Athletics Disclosure Act or NCAA certification. It must be underscored that this court made no comment of the *Gebser* verbiage as to whether it did or did not involve the official policy of the recipient.²⁷⁸ The appellate court also disregarded UMD's alleged "disproportionately low athletic scholarships awarded to women" as evidence of deliberate indifference.²⁷⁹ The plaintiffs in *Grandson* unsuccessfully

271. Univ. of Bridgeport, No. 1-94-2075 (Nov. 4, 1994) (AC), in OCR Data, *supra* note 255, at 2; Ulett v. Univ. of Bridgeport, No. 3:94CV01460 (PCD) (D. Conn. Aug. 1994) (class-action commenced, concerning the university's elimination of the women's gymnastics team; consent decree entered into during July 1995). See Heckman, *Sex Discrimination in the Gym*, *supra* note 16, at 584 (discussing case).

272. *Grandson*, 272 F.3d at 576.

273. *Id.* at 576. See 34 C.F.R. § 106.41(c).

274. See Policy Interpretation, 44 Fed. Reg. at 71,414 ("[t]he governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program."); *Clarification Letter*, *supra* note 206.

275. Policy Interpretation, 44 Fed. Reg. at 71,415 (VII.A.3).

276. *Grandson*, 272 F.3d at 575.

277. *Id.*

278. *Gebser*, 524 U.S. at 290 ("that do not involve official policy of the recipient").

279. *Grandson*, 272 F.3d at 576.

sought final appellate review by the Supreme Court.²⁸⁰

2. Mercer v. Duke University

The next case received national attention. It involved the issue of athletic participation. Heather Sue Mercer played high school soccer at Yorktown Heights High School in Westchester County, New York, where she also was a kicker for the boys' football team.²⁸¹ She then went on to Duke University. The NCAA Division I university had a football team, which was deemed a coed sport, although no females had ever made the team. Despite the longevity since Title IX's enactment in 1972, there had yet to be a female on a NCAA Division I men's or "coed" football team, and there were no football teams offered exclusively for females regardless of the NCAA division. During Mercer's freshman year, 1994-95, she had a try-out for the football team, before both the head coach and kicking coach.²⁸² The coach was dressed in a suit and tie.²⁸³ Both coaches would testify that conditions were not ideal, and as a result Mercer did not do well. She did not make the team for that season.²⁸⁴ That spring, she kicked the winning field goal during an annual spring football contest, where she was the first kicker selected by team members.²⁸⁵ After this, the head coach informed Mercer and others that she had made the team.²⁸⁶ This resulted in Mercer receiving calls to be on certain network late night shows, which she accepted.²⁸⁷ The university was aware of the publicity.²⁸⁸

Apparently, after this, the coach was concerned that "Mercer's presence on the team might have an adverse effect on his players and recruiting."²⁸⁹ While it was customary for members of the team to attend a pre-season camp,

280. 535 U.S. 1054 (2002).

281. *Mercer v. Duke Univ.*, 181 F. Supp. 2d 525, 529 (M.D.N.C. 2001). While Title IX allows a school to provide separate teams for contact sports, such as football, it is not uncommon for New York high school football teams to have female place kickers, as the state regulations are more favorable to allowing females to participate on certain contact sports where they have satisfied that they are physically able. See N.Y. Comp. Codes R. & Regs., tit. 8, § 135.4(c)(7) (2003). There have been female place kickers at Valley Stream Central High School and Hewlett High School in Nassau County, New York.

282. *Mercer*, 181 F. Supp. 2d at 530.

283. *Id.*

284. *Id.*

285. *Id.* at 530-31.

286. *Id.* at 531.

287. *Mercer*, 181 F. Supp. 2d at 531.

288. *Id.*

289. *Id.*

that summer the coach did not allow Mercer to attend.²⁹⁰ The coach called the coed and asked her why she was still interested in football and apparently suggested she should instead be competing in beauty pageants.²⁹¹ There were other things, such as sending a letter to members of the team with the salutation of "men," and a meeting with the student and her mother concerning her status on the team, to which the coach allegedly informed them it was the worst decision of his life and that Mercer should instead try-out for the cheerleading team.²⁹² At this meeting, Mercer was also informed that she would not be issued a uniform or pads for the coming season, including practices, and would not be allowed to dress or even stand with the team.²⁹³

On August 25, 1995, the university's sports information director issued a press release indicating Mercer was not on the active roster.²⁹⁴ Apparently, no other member of the football team had ever received this designation.²⁹⁵ After the issuance of this statement, Mercer was requested to meet with the press, which she was reluctant to do, but was informed it was part of her obligation to the team.²⁹⁶ She read a statement summarizing certain alleged statements made by the coach and indicating that she would essentially be treated like an injured player.²⁹⁷ She concluded, "I regret to say it, but it is a fiction that I am a member of the Duke football team. I believe that if I were a man and had the same kicking skills that I have now, I would be a member of the Duke football team"²⁹⁸ The next fall, the coach informed Mercer there was no place for her on the team. It was reported that no member of the team had ever been dismissed by the coach for performance reasons.²⁹⁹ That winter, she was prohibited from participating in winter conditioning sessions.³⁰⁰ Obviously, the football coach was aware of what was going on.

During the spring of 1997, Mercer's attorney contacted the university's attorney, concerning the treatment she received, and indicated his client's desire to meet with a university official. Both the university's president and athletic director declined this request. The university's attorney apparently

290. *Id.* at 531.

291. *Id.* at 532.

292. *Mercer*, 181 F. Supp. 2d at 532.

293. *Id.* at 532. She was the only member of the team not issued a uniform or pads that season. *Id.* at 533.

294. *Id.* at 532.

295. *Id.* at 533.

296. *Id.*

297. *Mercer*, 181 F. Supp. 2d at 532-33.

298. *Id.* at 533.

299. *Id.* at 534.

300. *Id.* at 533.

met with the football coach, the team trainer, and perhaps the kicking coach, concluding there was no validity to Mercer's claim.³⁰¹

Mercer then commenced a lawsuit against the university predicated on violation of Title IX, in *Mercer v. Duke University*.³⁰² Initially, the North Carolina District Court granted the University's motion for summary judgment.³⁰³ The Fourth Circuit disagreed with this determination, finding that the denial of a member of one sex to compete on a coed team must be balanced with the first subpart of the "Athletics" regulation, which prohibited the discrimination on the basis of sex.³⁰⁴ The appellate court stated, "Where, as here, however, the university invites women into what appellees characterize as the 'traditionally all-male bastion of collegiate football,' . . . we are convinced that this reading of the regulation is the only one permissible under law."³⁰⁵ On remand, the case received further media coverage with the jury's verdict awarding Mercer \$1.00 in compensatory damages and \$2 million in punitive damages. The University challenged the verdict; however, the district court granted a final judgment sanctioning the monetary awards rendered by the jury.³⁰⁶ A further appeal was pursued, where "the Fourth

301. *Id.*

302. 32 F. Supp. 2d 836 (M.D.N.C. 1998) [hereinafter *Mercer I*] (granting the university summary judgment), *rev'd & remanded*, 190 F.3d 643 (4th Cir. 1999) [hereinafter *Mercer II*], *on remand*, 181 F. Supp. 2d 525 (M.D.N.C. 2001) [hereinafter *Mercer III*] (upholding monetary damages), *vacated in part*, 50 Fed. Appx. 643 (4th Cir. Nov. 15, 2002) (unreported decision) (surprisingly this decision was not selected for inclusion in the Federal Reporter) [hereinafter *Mercer IV*] (prohibiting punitive damages in Title IX actions). See Heckman, *The Glass Sneaker*, *supra* note 1, at 564-66. During September 1999, Katie Hnida became the first female to dress for a NCAA Division I-A football game for the University of Colorado, although she did not get into the game. *Sports Shorts: Duke Must Pay \$2M to Female Kicker*, N.Y. POST, Oct. 13, 2000, at 86. Two years later, during August 2001, another placekicker, Ashley Martin, entered the record books when she became the first female to score a point in a Division I football game, when she kicked two extra points for Jacksonville State University. Heckman, *The Glass Sneaker*, *supra* note 1, at 565. During 2003, the University of Minnesota refused to allow Mary Nystrom to tryout for the NCAA Division I men's football team. *Sports Flash*, NEWSDAY (N.Y.), April 19, 2003, at A29.

303. *Mercer I*, 32 F. Supp. 2d at 837. See also 34 C.F.R. § 106.41(a).

304. *Mercer II*, 190 F.3d at 647-648. The court stated:

We therefore construe the second sentence of subsection (b) as providing that in non-contact sports, but not in contact sports, covered institutions *must* allow members of an excluded sex to try out for single-sex teams. Once an institution has allowed a member of one sex to try out for a team operated by the institution for the other sex in a contact sports, subsection (b) is simply no longer applicable, and the institution is subject to the general anti-discrimination provision of subsection (a).

Id. at 647-48 (emphasis added). The district court in *Mercer III* stated, "[O]nce a member of the opposite sex is given the opportunity to participate on a same-sex contact sports team, that member of the opposite sex must be treated equally and given the same types of opportunities that other members of the team are given." *Mercer III*, 181 F. Supp. 2d at 539.

305. *Mercer II*, 190 F.3d at 648.

306. *Mercer III*, 181 F. Supp. 2d 525, *vacated in part*, *Mercer IV*, 50 Fed. Appx. at 643.

Circuit ruled that punitive damages were not recoverable in a Title IX action."³⁰⁷

However, the decision is noteworthy because the district court, in its second decision, expounded on the notice provision. Initially, the North Carolina District Court concluded the female student-athlete had properly placed the university on notice in conformity with the *Gebser* standard.³⁰⁸ While it was undisputed among the parties that both the university president and athletic director would be deemed appropriate persons,³⁰⁹ the university contested whether these individuals had been placed on notice, as Mercer did not complain to any official at the university about the discrimination, specifically either the president or athletic director. Interestingly, this represents the first judicial opinion to so rule that an athletic director would be deemed an appropriate individual. More significantly, the court allowed a wide latitude as to how the "appropriate persons" came to have such notice, stating:

[I]n order for institutional liability to arise under the *Gebser* standard, the university official must simply have actual knowledge of the alleged discrimination, as opposed to having mere constructive knowledge of it The source of the information, therefore, is immaterial to the analysis of whether liability attaches. It is not necessary in this case to undergo an extensive fact analysis of whether the requisite officials for Defendant had actual knowledge of Mercer's claim of gender discrimination because both [the University president] and Athletic Director . . . admitted during trial that they were actually aware of Plaintiff's claim of gender discrimination.³¹⁰

Thus, it appears the aggrieved individual would need not personally inform the appropriate person, only that that the appropriate person somehow came to know the information. Herein, it was clear that Mercer did not personally inform either the university president or athletic director. This court also found the University's response could equate with deliberate indifference.³¹¹

Secondarily, in examining the second area of the *Gebser* decision, the court concluded that the football coach was deemed an official with policy-making authority,³¹² another groundbreaking determination. The court

307. Heckman, *The Glass Sneaker*, *supra* note 1, at 565 (referring to Mercer IV).

308. *Mercer III*, 181 F. Supp. 2d at 539-40.

309. *Id.* at 540.

310. *Id.*

311. *Id.* at 542.

312. *Id.* at 543.

opined, "In essence, this means that an individual may be considered a policy-making official if the individual speaks with final policy-making authority for the defendant institution concerning the action alleged to have caused the violation of Title IX."³¹³ Herein, the football coach had authority to make final decisions as to the composition of the team.³¹⁴ Query, whether satisfaction of only this second aspect would have been sufficient for a Title IX plaintiff to go forward? The University's appeal concentrated on the issuance of punitive damages, and so the Fourth Circuit, in its second review of the case, did not address the *Gebser* notice issue.³¹⁵

3. Addendum

The *Grandson* opinion raises more questions than it answers. Did Grandson ever communicate with her coach about the alleged inequities in the women's athletic program at the university? Did she ever communicate with the athletic director? The Eighth Circuit did not elucidate whether the athletic director or any of the assistant athletic directors on their own volition were aware of the inequities pertaining to the issuing of athletic scholarships *vis-à-vis* the percentage of athletic scholarships issued for members of one sex compared to the percentage of student-athletes of that sex. It was clear, as of 1998, that the OCR would only tolerate a difference of one percent in the comparison or the difference of one scholarship. The court did opine that a university has a certain flexibility in phasing in scholarships as new teams are added. Should this tolerant approach be allowed thirty-one years after Title IX's enactment?

The *Mercer* decision is extremely noteworthy for three reasons: first, it clearly embraces that a coach can be an educational employee charged with making official policy decisions; secondly, it does not matter how the "appropriate person" came to have knowledge of the alleged sexual harassment, only that it does come to the individual's attention; and thirdly, that an athletic director will be deemed an "appropriate person."

However, to argue that schools do not have knowledge of Title IX violations in the post-*Gebser* era for the following situations, is preposterous: schools that eliminate teams for one sex, where satisfaction of the effective accommodation test is not satisfied (the percentage for students of that sex is not substantially proportional to the percentage for student-athletes of that sex, there has been no continuing expansion of teams and opportunities for the

313. *Mercer* III, 181 F. Supp. 2d at 543.

314. *Id.*

315. See generally, *Mercer* IV, 50 Fed. Appx. 643.

disadvantaged sex, and the current program does not fully and effectively accommodate the interests of members of the disadvantaged sex);³¹⁶ schools that have not elevated club teams to varsity status where the school is not in compliance with the effective accommodation test;³¹⁷ schools that do not have "substantial" proportionality between the percentage of athletic scholarships for one sex compared to the percentage of student-athletes of that sex;³¹⁸ and cases where members of only one sex are relegated to inferior off-school grounds athletic facilities.³¹⁹

VI. CONCLUSION

Claims of sexual harassment have increased dramatically in the last decade. While Title IX has theoretically provided another avenue to seek

316. See 34 C.F.R. § 106.41(c); Policy Interpretation, 44 Fed. Reg. 71,413 (Dec. 11, 1979); Policy Clarification (Jan. 16, 1996). The effective accommodation test used to determine compliance with the first program area of the equal opportunity subpart of the Title IX regulations has been approved by every federal circuit court of appeals to be presented with the issue, including the First Circuit in *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993) (seeking the retention of two women's varsity teams, gymnastics and volleyball; granting the female student-athletes a preliminary injunction against the University); *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996) (granting the plaintiffs a permanent injunction against the University), *cert. denied*, 520 U.S. 1186 (1997); the Third Circuit in *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3d Cir. 1993) (successfully seeking the retention of two women's varsity teams); the Sixth Circuit in *Miami University Wrestling Club v. Miami University* (Ohio), 802 F.3d 608 (6th Cir. 2002) (unsuccessfully seeking the retention of the men's wrestling team); and *Horne v. Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994); the Seventh Circuit in *Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000); and *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994), *cert. denied* 513 U.S. 1128 (1994) (unsuccessfully sought the retention of the men's swimming team where the first prong of the effective accommodation test was met); the Eighth Circuit in *Chalenor v. University of North Dakota*, 291 F.3d 1042 (8th Cir. 2002) (unsuccessfully seeking the retention of the men's wrestling team, where the first prong of the effective accommodation test was met); the Ninth Circuit in *Neal v. Bd. of Tr.*, 198 F.3d 763 (9th Cir. 1999) (unsuccessfully sought the retention of the men's varsity wrestling team where the first prong of the effective accommodation test was met); and the Tenth Circuit in *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993) (successfully seeking the retention of the women's softball team at Colorado State University, which was slated for elimination), *cert. denied*, 510 U.S. 1004 (1993). The Fifth Circuit embraced the effective accommodation test, *infra*. See Heckman, *The Glass Sneaker*, *supra* note 1, at 568-69, 572-73, 585 (discussing the cases).

317. See *Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000) (successfully seeking the elevation of two women's club teams, soccer and softball, to varsity teams).

318. See 34 C.F.R. § 106.37(c); OCR Guidance Letter, *supra* note 202.

319. See, e.g., *Landow v. Sch. Bd. of Brevard County*, 132 F. Supp. 2d 958 (M.D. Fla. 2000) (girls' high school softball team played on municipal baseball fields, rather than fields set for softball dimensions, while the boys' baseball team played on baseball diamonds on the school grounds). There were other inequities for the girls' softball teams, concerning the "electronic scoreboards, batting cages, bleachers, signs, concession stand, press box, bathroom facilities and field lighting." Heckman, *The Glass Sneaker*, *supra* note 1, at 581.

redress for sexual harassment, the parameters have yet to be decisively revealed. The 1992 Supreme Court decision in *Franklin* led to the conclusion that a prospective plaintiff could assert a claim for sexual harassment against an educational institution that was a recipient of federal funds; however, the standard to be applied and even whether this extended to claims predicated upon actions of students, remains unclear.

There were some signposts issued. In *Gebser v. Lago Vista Independent School District*, the Supreme Court advised the nation that liability will not be imposed against the educational institution for the intentional actions of its employees in a teacher-student sexual harassment case unless the institution had actual notice of the misconduct and exhibited deliberate indifference to such conduct. The Supreme Court decision in *Davis v. Monroe County Board of Education* likewise allowed for a Title IX peer sexual harassment action, but also imposed an exacting standard to find any liability against the educational institution. The clarity required to know what individuals must be informed, what notice must be given to be deemed sufficient notice, and what actions the education institution must take to avoid a charge of deliberate indifference, require further amplification.

It remains to be seen what the parameters will be as to whom will be the appropriate person to alert of the offensive conduct. Omitting classroom teachers and coaches from the paradigm would be dramatic in insulating the educational institutions from Title IX culpability. Such a red light-green light application appears unsightly when dealing with minors. Some of the facts found within are especially disconcerting as it appears that school districts were rewarded for failure of other teachers or principals not to put the school board members on notice of the offending actions.

Despite the passage of thirty years, it took more than a quarter-century to learn what standards would be applied in the sexual harassment context.

The reality is that for all practical purposes it is a student's teacher who is their supervisor. It should be enough for any student to inform a teacher, as one would expect that it would be within the duties and responsibilities of that teacher to alert their superiors, even if it is merely the department chair, who would likewise be responsible to inform his or her superior, the principal or head of the post-secondary institution, who would then be required to place the respective boards on notice. In the Title VII employment context, an adult is not required to inform the board members of corporations of sexual harassment nor even the chief executive officer. Query, why should a tougher standard be imposed on students? This is especially vexing when under Title IX it is the educational institution that receives federal funds in exchange for one condition, the requirement that they do not engage in sex discrimination. It is remarkable that despite the intervention of thirty years, the discourse of

Title IX's application to sexual harassment has essentially only begun in earnest since the late 1990's and the legal bar has been set at an extremely high level. How much higher remains to be seen. On the collegiate level, the NCAA should take the lead in implementing a sexual harassment policy for its member colleges and universities.

With traditional Title IX athletics claims of sex discrimination, it is submitted that any prerequisite notice provision should, if required, be deemed satisfied as therein the actions of the athletic department—as carried out by the athletic directors or coaches—represent the official policy of that educational institution. The thirty-year history of individuals seeking redress for claims of Title IX sex discrimination within athletic departments is one replete with legal minefields placed along the way, including: the extension of compliance with the 1975 regulations until the issuance of the 1979 Policy Interpretation and the 1984 Supreme Court decision in *Grove City College v. Bell*,³²⁰ effectively nullifying the statute's application to athletic department programs and activities, which took four years for Congress to finally rectify over a presidential veto by passage of the Civil Rights Restoration Act of 1987 (1988 amendments).³²¹ On the plus side, the Federal Circuit Courts of Appeals were uniform in their embrace of the effective accommodation test. However, whether the judiciary will require a condition precedent notice requirement in order to pursue a regular Title IX athletics case just represents another uphill climb in the long race to achieve gender equity in the nation's schools.

320. 465 U.S. 555 (1984).

321. 20 U.S.C. § 1687, 102 Stat. 28, Pub. L. 100-259 (1988).